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Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

ARLENE M. COOPER and CALVIN STOUDT,

Petitioners,

v.

CONNIE G. POWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does a student have a constitutionally protected property interest in continued enrollment in a post-secondary education program?

If yes,

2) Does a student have an interest that is protected by substantive due process to judicial review of an academic decision requiring the student to disclose her mental illness to her clinical practicum supervisor as a condition of continuing to participate in a counseling and guidance program?

If yes,

3) Whether the law was clearly established on the above questions in 1991 such that the university professors, who required the student to disclose her mental illness to the clinical practicum supervisor, were not entitled to qualified immunity?

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OPINIONS BELOW

The Wisconsin Supreme Court decision is reported and reprinted at App. 1a-7a. *Powell v. Cooper and Stoudt,* 241Wis. 2d 153, 622 N.W.2d 265 (2001). The Court of Appeals decision is unpublished and reported at 231Wis.2d 373, 607 N.W.2d 290 (2001). It is reprinted at App. 8a-36a. The decision of the circuit court is reprinted at App. 37a-48a.

JURISDICTION

The decision was entered on February 16, 2001. (App.1a) The Petition is timely. Jurisdiction is invoked under 28 U.S.C. § 1257 (a) (1994). The Wisconsin Supreme Court found a constitutionally protected property right in continuing a post-secondary education and denied the petitioners' qualified immunity defense. (App.5a, ¶ 12) The Wisconsin Supreme Court's decision is a final judgment. *Behrens v. Pelletier*, 516 U.S. 299, 307, 308 (1996).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

42 U.S.C. § 1983 provides:

> [e]very person who, under color of a statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Article XIV provides:

> [no] State shall deprive any person of life, liberty or property, without due process of law...

STATEMENT OF THE CASE

Respondent Connie G. Powell, a former graduate student in the counseling and guidance program at the University of Wisconsin-Stout, brought this action in Wisconsin circuit court under 42 U.S.C. § 1983 against Dr. Arlene Cooper and Dr. Calvin Stoudt. (App. 5a) Dr. Cooper was an assistant professor of counseling and psychological services and Dr. Stoudt was the program director for the School of Guidance, Counseling and Psychological Services, at the University of Wisconsin-Stout. (App. 49a)

As of January 1991, Powell had completed all of the course work needed for a Master's Degree in Guidance and Counseling. Powell had a grade point average of 3.887 in all completed classes and had paid all tuition and fees. The remaining requirements for obtaining the degree were participating in a clinical practicum experience, and preparing the Master's thesis. (App. 51a) As a condition of placement in the clinical practicum, Drs. Cooper and Stoudt required Powell to disclose to her clinical practicum supervisor her manic depressive condition. (App. 52a) Powell refused to provide that information to the practicum supervisor, although she had previously revealed her condition to two professors at the University of Wisconsin-Stout. (App. 51a-52a) As a result, she was not assigned to a clinical practicum experience. (App. 52a) She subsequently stopped attending the University and did not complete the counseling program. She brought suit against Drs. Cooper and Stoudt, alleging that her right to due process under the Fourteenth Amendment was violated by the requirement that she disclose her manic depressive condition to the practicum supervisor as a prerequisite of participating in the practicum.

(App. 53a) Powell seeks compensatory and punitive damages, costs, disbursements and attorney's fees. (App. 55a)

Drs. Cooper and Stoudt moved to dismiss the case on qualified immunity grounds. The circuit court denied the motion, ruling that Powell had a constitutionally protected property interest in continuing her graduate school education and determining that the right was clearly established in 1991 when Powell stopped attending the university. (App.46a). The Wisconsin Court of Appeals and the Wisconsin Supreme Court upheld this decision, the latter by an equally divided vote. (App. 5a, ¶ 12) The case was remanded to the circuit court for trial on the merits. (App.7a, ¶ 19)

REASONS FOR GRANTING REVIEW

Drs. Arlene Cooper and Calvin Stoudt respectfully request that a writ of certiorari issue to review the decision of the Wisconsin Supreme Court. That decision recognizes a constitutionally protected property interest that has never been established by this Court, and makes available a substantive due process standard of review that has not been mandated in prior case law. Granting certiorari would allow this Court to address and clarify the important constitutional questions left unanswered in *Board of Curators v. Horowitz,* 435 U.S. 78 (1978) and *Regents of the University of Michigan v. Ewing,* 474 U.S. 214 (1985), namely, whether students have a constitutionally protected property interest in continued enrollment in post-secondary education programs, and; whether courts can review an academic decision of a public educational institution under a substantive due process standard. Granting certiorari would also permit this Court to overturn the Wisconsin Supreme Court's erroneous opinion

holding that a constitutionally protected property right was clearly established in 1991 for qualified immunity purposes.

The erroneous decisions of the Wisconsin Supreme Court and Court of Appeals were predicated upon this Court's decisions in *Horowitz and Ewing.* In those cases, this Court *assumed,* without deciding, the existence of a constitutionally protected property interest in continuing a post-secondary education and reached the merits of the student claims. *Horowitz*, 435 U.S. at 84, 85; *Ewing,* 474 U.S. at 223, 224. Subsequent lower court decisions have frequently followed this Court's approach and *assumed* the existence of the protected interest, however, the resulting decisions demonstrate continuing confusion and division as to whether the right actually exists.

The uncertainty in the law is reflected in both federal and state court cases. The Seventh Circuit has assumed that a property right exists in one case, *Martin v. Helstad*, 699 F.2d 387, 390 (7th Cir. 1983), and in two others found such a right not clearly established and an open question in the circuit. *Osteen v. Henley*, 13 F.3d 221, 226 (7th Cir. 1993); *Akins v. Board of Governors of State Colleges and Universities*, 840 F.2d 1371, 1376, 1377 (7th Cir. 1988) *vacated on other grounds*, 488 U.S. 920 (1988). The Third Circuit has rejected the claim as a matter of law in one case, *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1397 (3d Cir. 1991), and affirmed it in another. *Stoller v. College of Medicine,* 562 F.Supp. 403, 412-414 (M.D. Pa. 1983), *aff'd without opinion,* 727 F.2d 1101 (3d Cir. 1984). The Sixth Circuit, however, has found such a right exists and has been "long recognized." *Stevens v. Hunt,* 646 F.2d 1168, 1169 (6th Cir. 1981) Another circuit has assumed the right exists without deciding the question. *See, e.g., Schuler v. University of Minnesota*, 788 F.2d 510, 513 n. 6 (8th Cir. 1986), *certiorari denied,* 479 U.S. 1056 (1987).

State supreme courts that have addressed the issue are similarly divided. The Hawaii Supreme Court has held the right is not clearly established under federal qualified immunity analysis. *Soong v. University of Hawaii*, 72 Haw. 586, 590, 825 P.2d 1060, 1062 (Haw. 1992). The West Virginia and Minnesota appellate courts have apparently recognized a property right. *Evans v. West Virginia Board of Regents*, 165 W.Va. 780, 781, 271 S.E.2d 778, 780 (1980); *Abbariao v. Hamline University School of Law*, 258 N.W.2d 108, 112 (Minn. 1977).

In Wisconsin the situation is particularly confusing. Wisconsin's Court of Appeals found a constitutionally protected property right in *Powell,* yet found no property right a year later in a case involving a Ph.D. candidate. *Reidinger v. Board of Regents of the University of Wisconsin,* 2001 WI App 31, ¶ 6, 622 N.W.2d 770 (Ct. App. 2000) (Unpublished). The Wisconsin Supreme Court affirmed *Powell* in a split, three-to-three decision. (App. 5a, ¶12) Additionally, while the District Court for the Western District of Wisconsin initially held that a constitutionally protected property right existed, *Martin v. Helstad,* 578 F. Supp. 1473 (W.D. Wis. 1983), the same District Judge, in an opinion in a subsequent case, ruled the issue an open question. *Shudooh v. University of Wisconsin-Madison et al.*, (Case No. 00-C-0267-C)(W.D. Wis. April 4, 2001.) (Unpublished) Finally, the Seventh Circuit, as noted previously, has both assumed the right existed and declared the matter an open question.

This confusion, coupled with the willingness of lower courts to assume the existence of a constitutionally protected property interest and proceed to review academic decisions on the merits, has encouraged increasing numbers of students to litigate academic decisions. Despite this Court's repeated cautions against judicial intervention in the academic

decision-making process, *Horowitz*, 435 U.S. at 92, *Ewing*, 474 U.S. at 225 and 226, universities more and more often find themselves required to defend their academic judgments in court. A decision on the underlying constitutional issues left undecided in *Horowitz* and *Ewing* would bring clarity to the law, and could provide guidance on the extent of deference appropriately due to academic decisions, consistent with the First, Fifth and Fourteenth Amendments.

Finally, the Wisconsin Supreme Court improperly denied qualified immunity to Drs. Cooper and Stoudt. The court's split decision, holding that in 1991 a constitutionally protected property interest in continued enrollment in a post-secondary program was clearly established, is simply incorrect. The relevant federal case law shows an utter lack of a consensus on the issue that entitles the petitioners to qualified immunity.

ARGUMENT

I. THE WISCONSIN SUPREME COURT'S HOLDING THAT A STUDENT HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN CONTINUING A GRADUATE SCHOOL EDUCATION ESTABLISHES A RIGHT THAT HAS NEVER BEEN RECOGNIZED BY THIS COURT.

The Wisconsin Supreme Court's decision established a constitutional right not previously recognized by this Court. Indeed, its finding of a clearly established constitutional right to continued *post-graduate* education

appears contrary to this Court's decisions. This Court has held that an *elementary* school education is not among the fundamental rights protected explicitly or implicitly under the United States Constitution, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 34, 35 (1973). One year later, the Court found a property interest in elementary and secondary education based strictly on a state statute's clear guarantee of a free public education, *Goss v. Lopez*, 419 U.S. 565, 573 (1974). The decision of the Wisconsin Supreme Court adds to the confusion among lower courts as to whether such a right exists under the United States Constitution, and exposes higher education institutions to attacks on their academic judgments. The grant of the writ of certiorari would allow this Court to resolve the issue whether there is a protected property interest in continued enrollment in a graduate school program, and provide clarity to the lower courts.

The Wisconsin Supreme Court determined the existence of a property interest without citation to any authority or basis in state law. The Wisconsin Court of Appeals based its determination that the property right existed on two cases: *Frank v. Marquette University*, 209 Wis. 372, 377, 245 N.W. 125 (1932) and *Martin v. Helstad*, 578 F. Supp. 1473 (W.D. Wis. 183). *Frank*, however, does not stand for the proposition that a student has a constitutionally protected interest in continuing in a program of graduate study. Frank sued a private university based on a contract theory. The Wisconsin Supreme Court concluded that a school could not "arbitrarily or capriciously dismiss a student or deny him the right to continue his course of study." *Frank*, 209 Wis. at 377. *Frank* relied on *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909). In *Ewing*, this Court severely eroded *Booker*, calling it "an antiquated race discrimination decision" ... "whose holding has since been overtaken by events". *Ewing*, 474 U.S. at 222 n. 7.

Additionally, there was no state action in *Frank*, hence there were no Fourteenth Amendment or other constitutional issues involved. *Frank* does not stand for the proposition that a student has a *constitutionally protected* state property interest in continuing a graduate school education. *Martin* states, with little elaboration, that there is a property right in continuing in law school, apparently based on this Court's willingness to assume the existence of such a right in *Horowitz*. *Martin v. Helstad*, 578 F. Supp. at 1480. As discussed later, the mere assumption that a right exists does not, of itself, bring that right into existence.

In this case, the Wisconsin Supreme Court did not fully develop its analytical basis for concluding that the property interest exists and its decision appears to depend heavily upon this Court's assumption in the *Horowitz* and *Ewing* cases, that such a right existed. Yet, as discussed above, in both of those cases, this Court declined the opportunity to decide the issue.

In *Horowitz*, a student was dismissed from medical school due to poor hygiene and tardiness. She sued, claiming that she had a liberty interest in pursuing her medical school education, *Id. at 82*. This Court assumed, without deciding, that she had a liberty or property interest in pursuing her education, but upheld the decision of the university, concluding that, whether or not she had a constitutionally protected interest, she had received as much process as was required under the Fourteenth Amendment. *Id.* at 84-85.

The Court next considered this issue in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985). There, the University of Michigan dismissed Ewing from the medical school program for academic deficiencies. Ewing contended he had a constitutionally protected property interest in continued enrollment at the University. He also

asserted his dismissal was arbitrary and capricious and violated a substantive due process right. *Ewing,* 474 U.S. at 217. Instead of determining whether the procedural and substantive due process rights existed, this Court accepted the University's invitation to "assume the existence of a constitutionally protected property right in [Ewing's] continued enrollment" at the University, noting that "no party has challenged it." *Ewing,* 474 U.S. *at 224.* Again, this Court concluded that Ewing's dismissal was not arbitrary and capricious. However, the Court questioned Ewing's basis for claiming a constitutionally protected property interest, *Id. at 222 n. 7.* According to a concurring opinion by Justice Powell: "[Ewing's] claim to a property right is dubious at best." *Ewing,* 474 U.S. at 229.

The lack of a ruling from this Court on the underlying constitutional issues has spawned extensive litigation of academic decisions and caused confusion in the lower courts, as illustrated by this case. Lower courts have generally avoided the issue or assumed the right exists, often based on the parties' willingness to concede the existence of a constitutionally protected property interest under state law, as in *Ewing,* 474 U.S. at 224. Or the courts' assuming the existence of such a right, for the sake of argument, as in *Horowitz,* 435 U.S. at 92. Here, the existence of a property right and the constitutional protections associated with it are contested. This case presents the opportunity to settle the issue and provide guidance to courts, students and academic institutions across the nation.

A survey of lower court decisions reflects the lack of clarity or uniformity in analysis. Some courts have assumed the right exists: *Hamil v. Vertrees,* 2001 WL 135716 at p. 6 (M.D. Ala. Jan. 10, 2001) ("Every case the court has uncovered also assumed, without deciding, that 'a student who is subject to academic dismissal may maintain a cause

of action for the violation of his right to substantive due process.'"... "In short, no court has decided whether a protected property interest exists in a graduate school education."); *Martin v. Helstad,* 699 F. 2d 387, 390 (7th Cir. 1983) (Court assumed the existence of a property interest once admitted to law school). *Mauriello v. U. of Med. & Dentistry of N.J.,* 781 F.2d 46, 52 (3d Cir. 1986) (Court assumed the existence of a constitutional right.); *Haberle v. University of Alabama in Birmingham,* 803 F.2d 1536, 1539 n. 1(11th Cir. 1986) (Court followed Supreme Court's lead in *Ewing* and assumed a protected property interest existed.); *Schuler v. University of Minnesota,* 788 F.2d 510, 513, 514, n. 6 (8th Cir. 1986) (Court assumed existence of a property right.); *Hammond v. Auburn Univ.,* 669 F.Supp. 1555, 1561 (M.D. Ala. 1987) *aff'd mem.,* 858 F.2d 744 (11th Cir. 1988)(Court assumed a constitutionally protected property right exists in post-secondary education.").

Other courts have avoided the issue: *Richmond v. Fowlkes,* 228 F.3d 854, 859 (8th Cir. 2000)("Whether a student who is subject to academic dismissal may maintain a cause of action for the violation of his right to substantive due process remains an open question."); *Nickerson v. University of Alaska, Anchorage,* 975 P.2d 46, 52 (Alaska 1999) ("We do not address the broader issue of whether a student has a property interest in continued enrollment in a graduate program....").

One court rejected the claim as a matter of law: *Unger v. National Residents Matching Program,* 928 F.2d 1392, 1397 (3d Cir. 1991) ("We hold Unger's attempt to state a claim arising out of a property interest in the pursuit and continuance of her graduate school medical education fails as a matter of law".) Yet a few years later the Third Circuit affirmed a District Court's finding that a student had a constitutionally protected right in the continuation of

studies. *Stoller v. College of Medicine,* 562 F.Supp. 403, 412, (M.D. Pa. 1983), *aff'd w/o opinion,* 727 F.2d 1101 (3d Cir. 1984). The Sixth Circuit found a [constitutionally protected?] right to study medicine "long recognized by the state of Tennessee." *Stevens v. Hunt,* 646 F.2d 1168, 1169 (6th Cir. 1981).

Still other courts have found that there is a property interest in continuing an education: *Anderson v. University of Wisconsin,* 665 F. Supp. 1372, 1396 (1987) ("The Court does not argue with the plaintiff's contention that a student has a property interest in continuing education once the student has begun a course of study."); *Hall v. University of Minnesota,* 530 F. Supp. 104, 107 (D. Minn. 1982) (Right to continued enrollment in university constitutes a property right protected by due process clause.); *Evans v. West Virginia Bd. of Regents,* 271 S.E.2d 778, 780 (W. Va. 1980) (Court recognized a medical student's property interest in continuation/completion of his medical education, triggering due process protections.); *Stoller v. College of Medicine,* 562 F.Supp. 403, 412-414 (M.D. Pa. 1983), *aff'd without opinion,* 727 F.2d 1101 (3d Cir. 1984) (Medical student had a constitutionally protected property right in continuing education.); *Stevens v. Hunt,* 646 F.2d at 1169 ("A qualified property right in studying and practicing medicine has long been recognized by the State of Tennessee.")

The confusion generated by this Court's assumption that a property right exists is particularly troublesome in Wisconsin. For example, in *Martin v. Helstad,* 578 F. Supp. at 1480, the District Judge, relying on the United State's Supreme Court's *assumption* of a property interest in *Horowitz,* found that a student had a property interest in continuing in law school once admitted. The District Judge in *Martin,* however, has since changed her mind and recently acknowledged that no court has decided whether a protected

property interest exists in a student's post-secondary education. Nevertheless, the District Judge assumed the student has such an interest that entitles him to substantive due process. *Shudooh v. University of Wisconsin-Madison et al.*, (Case No. 00-C-0267-C)(W.D. Wis. April 4, 2001.) (Slip op. at p. 14) (Unpublished).

The Wisconsin Court of Appeals, relying in part on *Martin v. Helstad,* found that Powell had a property interest in continuing her education. (App. 14a, 15a) Yet a year later in a case involving a student's attempt to contest his dismissal from a graduate program in political science due to failing his preliminary examination, the Court of Appeals ruled differently, holding that the student had no property interest. *Reidinger v. Board of Regents of the University of Wisconsin,* 2001 WI App 31, ¶ 6, 622 N.W.2d 770 (Ct. App. 2000) (Unpublished).

As these cases demonstrate, the question whether there is a constitutionally protected property interest in continuing in a graduate program remains unsettled, and is treated in widely varying ways by the lower courts. Here, neither the existence of a property right nor the constitutional protections associated with it are conceded. This case presents the opportunity to settle the issue. If a student has a constitutionally protected property interest in a post-secondary education, courts, students and universities need to know it. Guidelines on the extent of those rights, along with the standards to be employed in protecting the rights, must be established. If, however, such rights do not exist, courts must cease acting as an appellate branch of colleges and universities.

II. THE WISCONSIN SUPREME COURT'S HOLDING, THAT A GRADUATE STUDENT HAS A SUBSTANTIVE DUE PROCESS RIGHT TO REVIEW AN ACADEMIC DECISION REQUIRING HER TO REVEAL A MENTAL ILLNESS TO HER CLINICAL PRACTICUM SUPERVISOR, HAS NEVER BEEN RECOGNIZED BY THIS COURT AND IS CONTRARY TO PRIOR DECISIONS OF THIS COURT.

The Wisconsin Court of Appeals, citing *Ewing*, found that Powell had a substantive due process right in continuing her education. (App. 20a, 21a) The Wisconsin Supreme Court affirmed, without citation to any authority. (App. 2a, ¶ 2, 5a, ¶ 12) In *Ewing*, however, this Court merely assumed the right existed. *Ewing,* 474 U.S. at 223. The Court found that Ewing had received adequate process under a substantive due process standard. It cautioned that courts should "show great respect for the faculty's professional judgment" and should not override it unless it is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Ewing*, 474 U.S. at 225, 227.

In post-*Ewing* litigation, lower courts have continued to *assume* the existence of a substantive due process right to review academic decisions, and--in doing so--have been drawn into the very process of second-guessing academic

judgments that this Court warned against in *Ewing*, and, earlier in *Horowitz*. Lower courts now frequently engage in the business of reviewing academic decisions, on the assumption that there is a substantive due process right to such review. This injection of judicial scrutiny into the academic arena, however, is contrary to this Court's expressed reluctance to intrude on the prerogatives of the academy, and to principles of academic freedom protected by the First Amendment.

This Court has a responsibility to safeguard academic freedom, which is "a special concern of the First Amendment" and has "transcendent value" to all Americans. *Ewing*, 474 U.S at 226; *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). This Court has frequently cited Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957), which described academic freedom as follows:

> " 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university -- to determine for itself who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' "

see, e.g., Ewing, n. 12; *see also Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) ("The freedom of a university to make its own judgments as to education includes the selection of its student body."); *Southworth v. Board of Regents of the University of Wisconsin System*, 120 S.Ct. 1346, 1358 (2000), Souter, J. concurring ("Our understanding of academic freedom has included . . . the idea that universities and schools should

have the freedom to make decisions about how and what to teach.")

Unfortunately, despite this Court's consistent support of institutional academic freedom, the lower courts have routinely used the Court's *assumption* of the existence of a substantive due process right to "second guess" academic decisions. The following cases all involve instances where courts have intruded on the academic freedom of educational institutions by reviewing the academic decisions of professional educators.

Failing grades: *Schuler v. University of Minnesota,* 788 F.2d 510, 515 (8th Cir. 1986) (reviewing decision to dismiss student who failed doctoral oral examination); *Anderson v. University of Wisconsin,* 665 F.Supp 1372, 1396 (W.D. Wis. 1987) (reviewing decision to deny readmission to law school after student was expelled for failing to maintain required grade average); *Hines v. Rinker,* 667 F.2d 699, 704 (8th Cir. 1981) (reviewing decision to dismiss medical student who failed internal medicine due to failing written final examination, failing to properly present a patient and failing to turn in work on time); *Alanis v. University of Texas,* 843 S.W. 2d 779, 788-89 (Tex. App. 1992) (reviewing decision to dismiss medical student who had missed exams, failed exams, and in three years had not satisfactorily completed all first year courses); *Kashani v. Purdue University,* 763 F. Supp. 995, 999-1000 (N.D. Ind. 1991) (reviewing decision to dismiss from program student who failed Ph.D. examination twice); *Eiland v. Wolf,* 764 S.W.2d 827, 836 (Tex. App. 1989)(reviewing decision to dismiss medical student for having five failing grades and consistently ranking near bottom of class).

Course and curriculum requirements: *Richmond v. Fowlkes,* 228 F.3d 854, 859 (8th Cir. 2000) (reviewing

decision of scholastic committee to reject student's proposed remedial plan and to adopt a committee plan for removing the student's academic suspension); *Shudooh v. University of Wisconsin – Madison, W.D. Wis. (Case No. 00-C-0267-C (April 4, 2001)*(reviewing claim that oral examination violated student's rights by failing to ask student about syntax or a preliminary paper)*; Disesa v. St. Louis Community College,* 79 F.3d 92, 95 (8th Cir. 1996) (reviewing decision to not permit student to make up classes and retake exams) ; *Haberle v. University of Alabama in Birmingham,* 803 F.2d 1536, 1540-41 (11th Cir. 1986) (reviewing decision to require a qualifying examination before allowing graduate student to embark on dissertation research and to not permit student a third attempt to pass qualifying exam); *Hankins v. Temple University*, 829 F.2d 437, 444 (3rd Cir. 1987) (reviewing decision to terminate physician from fellowship program at university hospital for excessive absenteeism, deficient clinical skills and abandonment of patients).

Clinical placements: *Leukutis v. University of Osteopathic Medicine and Health Sciences,* 524 N.W.2d 410, 413 (Iowa 1994) (reviewing decision to dismiss medical student who demonstrated gross lack of clinical and interpersonal skills during rotations); *Ikpeazu v. University of Nebraska*, 775 F.2d 250, 254 (8th Cir. 1985) (reviewing decision to dismiss pharmacy student due to performance problems in two clinical clerkships); *Lunde v. Iowa Board of Regents,* 487 N.W.2d 357, 362 (Iowa App. 1992) (reviewing decision to dismiss medical student for interpersonal and performance problems in residency and for failing clinical rotations); *Rossomando v. Board of Regents of the University of Nebraska,* 2 F.Supp. 2d 1223, 1225-26 (D.Neb. 1998)(reviewing decision to dismiss student in postgraduate orthodontics program for poor clinical performance and failing to meet requirements for readmission); *Clifton-Davis*

v. State of Oklahoma, 930 P.2d 833,834-35 (1996) (reviewing decision to dismiss student from therapeutic recreation specialist program after student failed to complete internship because two successive agencies suggested she be removed from their programs.); *Gaspar v. Bruton,* 513 F.2d 843, 846 (10th Cir. 1975) (reviewing dismissal of nursing student for incompetent and unsatisfactory performance in clinical training portion of course); *Hennessy v. City of Melrose,* 194 F.3d 237, 250-51 (1st Cir. 1999)(reviewing decision to drop student from teacher certification program after incidents arose during a teaching practicum causing friction with other teachers and raising questions about student's ability to function in a public school setting); *Lipsett v. University of Puerto Rico,* 637 F. Supp. 789, 808 (D.P.R. 1986*) rev'd on other grounds,* 864 F.2d 881 (1st Cir. 1988) (reviewing decision to cancel medical student's third-year surgery residency, based on conclusion that student would not make a good surgeon because of inability to follow program's line of authority and desire to do things her own way).

Professional educators, not the courts, have the responsibility to evaluate students and the expertise to do so. The process is not adversarial but centers around a continuing relationship between faculty and students, "one in which the teacher must occupy many roles—educator, adviser, friend, and at times, parent-substitute." *Horowitz,* 435 U.S. at 90, citing *Goss v. Lopez,* 419 U.S. at 594. Professional educators, not the courts, have the duty to identify any problems that limit a student's ability to succeed and pursue ameliorating alternatives. *Doe v. Washington University,* 780 F. Supp. 628, 631 (E.D. Mo. 1991). The duty of courts ***is not*** to second-guess academic decisions of professional educators, who are entitled to a presumption of honesty and integrity, unless actual bias, such as personal animosity, illegal prejudice or a personal or professional

stake in the outcome, can be established. *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U.S. 482, 497 (1976). Furthermore, courts are not to expand substantive due process, which has been limited to matters relating to marriage, family, procreation, and the right to bodily integrity, because the guideposts for responsible decision making in this uncharted area are scarce and open-ended. *Albright v. Oliver,* 510 U.S. 266, 271-72 (1994).

Unfortunately, the unresolved constitutional issues in *Ewing* and *Horowitz* have led to twenty years of cases *assuming* such rights exist; *assuming* courts are in a better position than professional educators to make academic decisions; and in this case, finding the rights actually exist. As a result, courts have expanded substantive due process to areas beyond which it has traditionally been limited, namely, marriage, family, procreation and bodily integrity, *Albright v. Oliver,* 510 U.S. at 271-72. It now includes the right to second-guess grades, the format of examinations (including questions asked – or not asked - on oral examinations), clinical skills, policies on make-up tests and performance evaluations.

Nationwide, students will now attempt to use *Powell* as precedent to claim constitutional protections in a variety of academic decisions, such as grades, examinations, curriculum requirements, clinical programs, extra-curricular activities and student evaluations. This decision undermines the authority of colleges and universities to set their own standards, select their own student body and make the routine day-to-day decisions they are uniquely qualified to do.

III. THE WISCONSIN SUPREME COURT INCORRECTLY HELD THAT A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT IN CONTINUING IN A HIGHER EDUCATION PROGRAM WAS CLEARLY ESTABLISHED IN 1991.

Under the doctrine of qualified immunity, public officials cannot be held personally liable unless the law was clearly established. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). In this case, the lower courts departed from the repeated holdings of this Court that the law is clearly established if and only if (a) there is a consensus in the case law that the defendant's conduct was unlawful under federal law, and (b) that consensus was fact-specific and not a generalized right.

"To prove the presence of a clearly established constitutional right, the plaintiff must point to 'closely analogous cases' decided prior to the petitioners' challenged actions." *Upton v. Thompson,* 930 F.2d 1209, 1212 (7th Cir. 1991) (citation omitted). "[W]hat is required is a "sufficient consensus," based on all relevant case law, indicating that the official's conduct was unlawful. *Landstrom v. Illinois Dep't of Children,* 892 F.2d 670, 676 (7th Cir. 1990). "[U]nless plaintiffs can show that a sufficient consensus clearly established the existence of a violated constitutional right, [that defendant] will receive qualified immunity from Plaintiffs' damage claims." *Crosetto v. State Bar of Wisconsin,* 12 F.3d 1396, 1403 (7th Cir.), *cert. denied,* 511 U.S. 1129 (1994).

Federal law, which is controlling on the qualified immunity issue, was not clearly established in 1991 on

whether a constitutionally protected property right existed. It is appropriate to look to U.S. Supreme Court and Seventh Circuit precedent to determine whether a right was clearly established. *Denius v. Dunlap,* 209 F.3d 944, 950 (7th Cir. 2000) In 1991, this Court had not decided the issue, it merely assumed such a right existed. *Horowitz,* 435 U.S. at 84, 85, *Ewing,* 474 U.S. at 223, 224. However, an assumption of a protected property right is insufficient under this Court's qualified immunity analysis to create a clearly established right. *Hamil v. Vertrees, 2001 WL 135716, *9* (M.D. Ala. 2001) citing *Jones v. Cannon,* 174 F.3d 1271, 1288 n. 11 (11th Cir. 1999); *Soong v. University of Hawaii,* 72 Haw. 586, 590, 825 P. 2d 1060, 1062 (1992). Furthermore, the Seventh Circuit had specifically ruled that such a right was not clearly established, stating:

> We believe that a university administrator, surveying these cases at the time the alleged activity described in the complaint took place, would have concluded that a substantive due process-based right to continued enrollment in a state-sponsored academic program was *not* clearly established. Therefore, the defendants in this case are protected from an action for damages by the doctrine of qualified immunity."

Akins v. Board of Governors, 840 F. 2d 1371, 1376, 1377 (7th Cir. 1988*) vacated on other grounds,* 488 U.S. 920 (1988) (emphasis supplied). The Seventh Circuit subsequently acknowledged that the existence of a property right is still an open question in the circuit. *Osteen v. Henley,* 13 F.3d 221, 226 (7th Cir. 1993).

Additionally, in 1991, the holdings of the other federal circuits were mixed. The Third Circuit had rejected the claim as a matter of law in one case, *Unger*, 928 F.2d at 1397, and affirmed it in another. *Stoller,* 562 F.Supp. at 412,

affirmed without opinion, 727 F.2d 1101 (3d Cir. 1984). The Sixth Circuit, however, had found such a right existed and was "long recognized." *Stevens,* 646 F.2d at 1169. The Eighth and Eleventh Circuits had assumed the right existed without deciding the question. *See, e.g., Schuler*, 788 F.2d at 513 n. 6; *Haberle,* 803 F.3d at 1539 n. 1.

"A split among courts regarding the constitutionality of conduct analogous to the conduct in question is an indication that the right was not clearly established at the time of the alleged violation." *Denius,* 209 F.3d at 951. The Wisconsin Supreme Court split evenly on the issue and wrongly denied the qualified immunity defense. *Denius,* 209 F.3d at 951. Drs. Cooper and Stout are being held to an understanding of constitutional law that the Wisconsin Supreme Court cannot agree upon. "If judges thus disagree on a constitutional question, it is unfair to subject [the defendant] to money damages for picking the losing side of the controversy." *Denius,* 209 F.3d at 951, quoting *Wilson v. Layne,* 526 U.S. 603 (1999).

The precedent existing in 1991 does not show a "sufficient consensus" on this issue to established the existence of a constitutional right. *Crosetto v. State Bar of Wisconsin,* 12 F.3d 1396, 1403 (7th Cir.), *cert. denied*, 511 U.S. 1129 (1994). The Wisconsin Supreme Court erred in denying Drs. Cooper and Stoudt qualified immunity.

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CONCLUSION

To reduce frivolous litigation and its burden upon colleges and universities nationally, and to clarify the state of the law, the Court should grant a writ of certiorari.

Respectfully Submitted,

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APPENDIX

APPENDIX

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Supreme Court of Wisconsin

Connie G. POWELL, Plaintiff-Respondent,
v.
Arlene M. COOPER and Calvin Stoudt,
Defendants-Appellants-Petitioners.

No. 98-0012.

Argued Sept. 6, 2000.
Decided Feb. 16, 2001.

¶1 PER CURIAM.

Dr. Arlene M. Cooper and Dr. Calvin Stoudt (Drs. Cooper and Stoudt), faculty at the University of Wisconsin Stout, seek review of an unpublished decision of the court of appeals,[1] affirming in part an order of the Circuit Court for Dane County, Paul B. Higginbotham, Judge. The court of appeals held that Drs. Cooper and Stoudt were not entitled to dismissal of a suit brought under 42 U.S.C. § 1983[2] by Connie Powell (Powell). Powell, who had been a graduate student at the Stout campus, alleged that actions taken by Drs. Cooper and Stoudt had deprived her of an interest protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Drs. Cooper

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[1] *Powell v. Cooper,* No. 98-0012, 1999 WL 516756, 1999 Wisc.App. LEXIS 794 (Wis.Ct.App. July 22, 1999).

[2] 42 U.S.C. § 1983 provides in part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, Subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of the rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress...

and Stoudt argue that Powell has not set forth a legally sufficient complaint alleging a deprivation of a constitutionally protected interest. Alternatively, Drs. Cooper and Stoudt contended that they are entitled to qualified immunity.

¶2 In this review we reach two issues. First, the court is evenly divided upon the question of whether Powell's complaint alleged the violation of a clearly established constitutionally protected property right such that defendants are not entitled to qualified immunity. Accordingly, we affirm the court of appeals' conclusion that Drs. Cooper and Stoudt are not entitled to qualified immunity from Powell's § 1983 claim based upon a deprivation of a property interest in continuing a course of study.

¶3 Second, the court unanimously reverses the court of appeals' conclusion that Powell's complaint states a claim asserting a liberty interest in refusing to unnecessarily disclose her mental health history. In her complaint, Powell did not assert a claim based upon a constitutionally protected liberty interest. Accordingly, we conclude that Powell waived an assertion of such a claim.

¶4 In addition to these two issues, we also address a procedural question relating to interlocutory appeal from a circuit court order denying a state official's claim of qualified immunity in a § 1983 action. The court of appeals concluded that although it is required to grant such a petition when it is initiated in a timely manner following a motion for summary judgment, the court may, in its discretion, grant such petitions after a motion to dismiss. *Powell v. Cooper,* No. 98-0012, unpublished slip op. at 16 n. 5, 1999 WL 516756 (Wis.Ct.App. July 22, 1999). We agree. When a petition for interlocutory review is filed prior to the litigation reaching the summary judgment stage, the court of appeals may

exercise its discretion in determining whether to grant review of the qualified immunity issue.

I

¶5 On motion to dismiss, and for purposes of qualified immunity analysis, the facts set forth in the pleadings are accepted as true. *Penterman v. Wisconsin Elec. Power* Co., 211 Wis. 2d 458, 463, 565 N.W.2d 521 (1997). In her amended complaint, Powell asserts that in 1987 she matriculated into the graduate student program in guidance and counseling at the University of Wisconsin-Stout. Powell told her academic advisor, Dr. David Cook, that she suffered from a manic-depressive disorder. Dr. Cook advised Powell that her condition would not affect completing the program.

¶6 Powell fulfilled all the requirements to obtain her degree, except for completing a practicum. and master's thesis. In December 1990 Powell spoke to Dr. Cooper about scheduling the practicum. for the spring of 1991. Powell informed Dr. Cooper of her manic-depressive disorder. Subsequently, Dr. Cooper declined to schedule Powell into the practicum program.

¶7 In January 1991 Powell met with Drs. Cooper and Stoudt. At the meeting, Powell was informed that she would be permitted to undertake the practicum. if she agreed to disclose her manic-depressive condition to the site supervisor. Powell refused to make this disclosure. As a result, she was not allowed to undertake the practicum and could not complete her course of study.

¶8 In January 1997 Powell filed suit against Drs. Cooper and Stoudt. Powell asserted that the actions by Drs. Cooper and Stoudt had deprived her of an interest protected by both the procedural and substantive aspects of the Due

Process Clause of the Fourteenth Amendment to the United States Constitution. The defendants filed a motion to dismiss, which was denied by the circuit court. The circuit court concluded that Drs. Cooper and Stoudt were not entitled to qualified immunity because in January 1991 the law was clearly established that Powell had a constitutionally protected property interest in continuing her graduate school program, which could not be denied without a hearing. In addition, the circuit court held that the actions by Drs. Cooper and Stoudt were arbitrary and capricious.

¶9 Subsequently, Drs. Cooper and Stoudt petitioned for interlocutory review. The court of appeals granted the petition and affirmed the circuit court. Drs. Cooper and Stoudt then petitioned this court to review the decision of the court of appeals, which was granted.

II

¶10 We begin by determining whether the court of appeals properly concluded that Powell had filed a complaint alleging a deprivation of both a constitutionally protected property and liberty interest. Whether a complaint states a claim upon which relief can be granted is a question of law, which this court reviews without deference to lower courts. *Weber v. City of Cedarburg,* 129 Wis.2d 57, 64, 384 N.W.2d 333 (1986). The court of appeals also concluded that Drs. Cooper and Stoudt were not entitled to qualified immunity. Application of the doctrine of qualified immunity is also a question of law, which we decide independently. *Arneson v. Jezwinski,* 225 Wis.2d 371, 592 N.W.2d 606 (1999).

III

¶11 The Fourteenth Amendment protects certain liberty and property interests. In this case, the court of appeals

determined that Powell's amended complaint alleged a clearly established property interest in continuing the course of study she had begun at the university. *Powell v. Cooper*, No. 98-0012, unpublished slip op. at 9, 1999 WL 516756 (Wis.Ct.App. July 22, 1999). In addition, the court of appeals held that Powell had claimed a liberty interest, which it identified as a privacy right in avoiding unnecessary disclosure of her mental health history. *Id.* at 10. The court of appeals concluded that Drs. Cooper and Stoudt were not entitled to qualified immunity because Powell's due process claims were grounded on clearly established property and liberty interests. *Id.* at 19.

¶12 We consider first Powell's assertion that she has a property interest in continuing her course of study begun at the university. Drs. Cooper and Stoudt contend that there is no such constitutionally protected property right and, as a result, there can be no due process violation. This court is equally divided on the question of whether Drs. Cooper and Stoudt are entitled to qualified immunity on this issue. Justices Ann Walsh Bradley, N. Patrick Crooks and David T. Prosser would affirm the court of appeals' conclusion that such a property right existed at the time in question, was clearly established, and accordingly the defendants were not entitled to qualified immunity. Justices William A. Bablitch, Jon P. Wilcox, and Diane S. Sykes would reverse, concluding that even assuming such property right existed at the time, it was not well established and therefore, the defendants were entitled to qualified immunity. Accordingly, the decision of the court of appeals concluding that there is a constitutionally protected property right in continuing her course of study, and that the defendants were not entitled to qualified immunity on that issue, is affirmed.

¶13 We turn next to consider the conclusion by the court of appeals that Powell sufficiently alleged a clearly

established liberty interest in not unnecessarily disclosing her mental health history. On this issue, we unanimously reverse.

¶14 It is well established that pleadings are to be liberally construed. *Morgan v. Pennsylvania Gen. Ins. Co.*, 87 Wis.2d 723, 731, 275 N.W.2d 660 (1979). A claim should not be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations. Id. The court of appeals construed Powell's complaint as asserting a liberty interest. However, Powell's complaint does not set forth any statement concerning a liberty interest, and at oral argument before this court, counsel for Powell stated that she did not plead a liberty interest. Under these circumstances, we concluded that the court of appeals' finding of a clearly established liberty interest in refusing to unnecessarily disclose her mental health history must be reversed.

¶15 Finally, the decision of the court of appeals presents an opportunity for this to clarify the circumstance under which the court of appeals is required to grant a petition for interlocutory appeal from a circuit court order denying a state official's claim of qualified immunity in a § 1983 action. The court of appeals concluded that under *Arneson v. Jezwinski,* 206 Wis.2d 217, 556 N.W.2d 721 (1996) (hereinafter *Arneson* I), as clarified in *Penterman,* that it is required to grant a petition for interlocutory review of a denial of qualified immunity when it follows a summary judgment motion; however, on motion to dismiss the court may, in its discretion, grant such an appeal if it determines that review of the qualified immunity issue is not premature. We agree.

¶16 In *Areson I,* we directed the court of appeals to grant every petition for interlocutory appeal from a circuit court order denying a state official's claim of qualified

immunity in a § 1983 action "so long as the circuit court order is based on an issue of law, such as whether the federal right allegedly violated was clearly established at the time the action was taken...." *Arneson I,* 206 Wis.2d at 220, 556 N.W.2d 721. When qualified immunity is raised as an affirmative defense, the plaintiff has the burden of demonstrating by closely analogous case law that the defendant violated a clearly established constitutional right. *Penterman,* 211 Wis.2d at 469, 565 N.W.2d 521. The question presented in such a case "is whether a reasonable state official could have believed his or her act was constitutional 'in light of clearly established law and the information [he or she] possessed' at the time of the official's action." *Penterman,* 211 Wis.2d at 470, 565 N.W.2d 521 (quoting *Burkes v. Klauser,* 185 Wis.2d 308, 326, 517 N.W.2d 503 (1994)). This inquiry is fact specific and "focuses on the circumstances with which the official is confronted." *Id.* at 471-72, 565 N.W.2d 521.

¶17 For the reasons set forth in *Arneson I,* we continue to conclude, pursuant to the this court's superintending power over lower state courts in article VI, section 3 of the Wisconsin Constitution, that the court of appeals should grant these petitions when they arise from a summary judgment order that turns on an issue of law and denies a claim of qualified immunity. However, when the interlocutory appeal arises on motion to dismiss, the court of appeals should exercise its sound discretion in determining whether or not to grant the petition. In a given case the facts and circumstances confronting the state official may not be sufficiently developed on motion to dismiss for the reviewing court to reach any other conclusion than to affirm the circuit court's denial of a qualified immunity claim.

¶18 The primary benefit of qualified immunity is immunity from suit. *Arneson I,* 206 Wis.2d at 226, 556

N.W.2d721. This benefit is lost if a case erroneously proceeds to trial. However in the proper case, and under the sound discretion of the court of appeals, allowing the action to proceed from motion to dismiss to the summary judgment stage will continue to provide officials with the benefit of this affirmative defense.

¶19 We conclude, therefore, that an interlocutory appeal from a circuit court's denial of qualified immunity shall be granted when it arises on motion for summary judgment, and is discretionary under the criteria set forth in Wis. State § 808.03 (2) (1997-98) when it arises from a motion to dismiss.

The decision of the court of appeals is affirmed in part, reversed in part, and the cause remanded to the circuit court.

¶20 SHIRLEY S. ABRAHAMSON, C.J., did not participate.

Court of Appeals of Wisconsin

Connie G. POWELL, Plaintiff-Respondent,
v.
Arlene M. COOPER and Calvin Stoudt, Defendants-Appellants.

No. 98-0012.

July 22, 1999.

APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before DYKMAN, P.J., VERGERONT and ROGGENSACK, JJ.

Doctors Arlene Cooper and Calvin Stoudt appeal from an order of the circuit court denying their motion to dismiss an amended complaint filed by Connie Powell. We conclude that Cooper and Stoudt are not entitled to dismissal based on qualified immunity because Powell sufficiently alleged a 42 U.S.C. § 1983 claim grounded in procedural and substantive due process violations, bottomed on a clearly established property interest in continuing a course of study and a clearly established liberty interest in refusing to unnecessarily disclose her mental health history. Regarding Powell's claim of negligent infliction of emotional distress, we conclude that the statute of limitations precludes this claim as presently pled. Therefore, we affirm in part; reverse in part and remand for further proceedings.

BACKGROUND

In the fall of 1987, Powell was admitted to the graduate program in guidance and counseling at the University of Wisconsin-Stout.[1] At that time, Dr. David Cook was assigned as her academic advisor. Powell told Cook that she had a history of manic-depressive disorder, and Cook advised her that it would not affect her completion of the graduate program at Stout. At that time and until December 1990, no UW-Stout staff member told Powell that her mental health history would affect the completion of her graduate work.

By December 1990, Powell had completed all of the course work required for a Master's Degree in guidance and counseling, with the exception of the practicum and Master's thesis. She spoke with Cooper to schedule her practicum for the spring of 1991. Upon telling Cooper of her manic-depressive condition, Cooper refused to assign Powell to a practicum.

On January 28, 1991, Cooper and Stoudt held a meeting with Powell during which Cooper told her she would be allowed to participate in the practicum necessary to completion of the masters degree program, only if she disclosed her manic- depressive condition to her practicum site supervisor. Stoudt knew about and approved of this requirement and supervised Cooper in offering it to Powell at the meeting. Powell refused to disclose her mental health history to her site supervisor and as a result, Cooper and Stoudt refused to permit her to participate in the practicum

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[1] All of the facts in this opinion are taken from the amended complaint, which facts, and the reasonable inferences therefrom, are presumed to be true for purposes of this motion. *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis.2d 458, 463, 565 N.W.2d 521, 526 (1997).

necessary to continuing her course of study. Prior to being refused admission to the practicum, Powell had a grade point average of 3.887 in all completed classes, had paid all tuition and fees, and was a graduate student in good standing.

On January 24, 1997, Powell filed suit under 42 U.S.C. § 1983 alleging that she had constitutionally protected rights: (1) to continue her graduate program at UW-Stout; (2) to refuse to unnecessarily reveal her manic-depressive condition to her practicum site supervisor; and (3) to a hearing to determine the necessity of the disclosure prior to precluding her from participating in the practicum. She also claimed Cooper and Stoudt's decision was arbitrary and capricious and she alleged the negligent infliction of emotional distress.

On December 23, 1997, the circuit court denied Cooper and Stoudt's motion to dismiss Powell's amended complaint, holding that the defendants were not entitled to qualified immunity because the law was clearly established in January of 1991 that Powell had a constitutionally protected property interest in continuing her graduate school education, which could not be denied without a hearing. The circuit court also concluded that Cooper and Stoudt's actions in refusing to permit Powell to participate in the practicum were arbitrary and capricious. Additionally, the circuit court declined to apply the state law defense of discretionary act immunity and held that the discovery rule tolled the running of the three-year statute of limitations under § 893.54(1), Stats. Cooper and Stoudt petitioned for leave to appeal and we granted their request.

DISCUSSION

Standard of Review.

Whether a complaint states a claim upon which relief can be granted is a question of law, which we review without deference to the circuit court's decision. *Heinrtiz v. Lawrence Univ.*, 194 Wis.2d 606, 610, 535 N.W.2d 81, 83 (Ct.App.1995). Whether immunity lies because of qualified immunity, or whether the complaint provides a statute of limitations defense on its face, are also questions of law which we review *de novo*. *Arneson v. Jezwinski*, 225 Wis.2d 371, 592 N.W.2d 606, 613 (1999) (citations omitted); *Barry v. Maple Bluff Country Club*, 221 Wis.2d 707, 714, 586 N.W.2d 182, 185 (Ct.App. 1998) (citations omitted).

Introduction.

Cooper and Stoudt raise eight issues in their appellate brief; however, the fourth issue was not raised in their petition for leave to appeal under § 808.03(2), Stats., nor is it a subpart of any issue that was set forth in the petition approved for appeal in our March 23, 1998 order. Because this issue was not specifically raised and approved for appeal, we will not consider it in this discretionary appeal. *See Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992); *Power Sys. Analysis, Inc. v. City of Bloomer*, 197 Wis.2d 817, 821 n. 2, 541 N.W.2d 214, 215 n. 2 (Ct.App.1995).

Qualified Immunity.

Qualified immunity is a doctrine that protects government officials from civil liability, if the complained of conduct does not violate constitutional rights which were

clearly established. It may be invoked when a federal claim is made. *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis.2d 458, 469, 565 N.W.2d 521, 528 (1997) (citing Ha*rlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct 2727, 73 L.Ed.2d 396 (1982)). Even though qualified immunity is an affirmative defense, a plaintiff must be able to demonstrate by closely analogous case law that the defendant's alleged conduct constituted a clearly established constitutional violation at the time the acts occurred. *Penterman*, 211 Wis.2d at 470, 565 N.W.2d at 529.

When we conduct a qualified immunity analysis presented through a motion to dismiss, we accept the facts pled in the complaint as true. *Id.*, at 463, 565 N.W.2d at 526. Therefore, at this stage in the litigation, our analysis requires us to construe Powell's allegations liberally and to view them in the light most favorable to her. *Trial Assocs., Inc. v. Robinson*, 10 F.3d 492, 495 (7th Cir. 1993). Further, the "possibility that [a defendant] will claim immunity does not require [a] plaintiff to anticipate and plead around that defense." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991).

1. Clearly Established Constitutional Violation.

Powell's constitutional claim invokes 42 U.S.C. § 1983.[2] Section 1983, in and of itself, does not create substantive constitutional rights; rather, it provides a remedy

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[2] 42 U.S.C § 1983 provides in relevant part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

for the deprivation of rights established elsewhere. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). To state a cause of action under § 1983, a party must allege that a person acting under the color of state law deprived that party of rights, privileges, or immunities protected by the Constitution or laws of the United States. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

Powell's amended complaint alleges that Cooper was an assistant professor of counseling and psychological services at UW-Stout and that Stoudt was the program director for the School of Guidance, Counseling and Psychological Services at UW-Stout. Further, she alleges they "act[ed] under color of statutes, regulations, custom, policy, and usage of the State of Wisconsin and the University of Wisconsin system" and that "[e]ach of the defendants herein acted under color of law in depriving the plaintiff of her rights under the Constitution of the United States, causing the plaintiff to suffer damage and injury." Based on these allegations, we conclude that Powell has satisfied the "under the color of state law" requirement. We therefore focus our inquiry on whether Powell has sufficiently alleged a deprivation of any right, privilege, or immunity secured by the Constitution or laws of the United States, which right and the deprivation thereof were clearly established when Cooper and Stoudt's actions occurred.

Powell claims that her right to due process was violated. In a § 1983 claim, alleging a violation of due process that is either procedural or substantive, a plaintiff must show a deprivation of a constitutionally protected interest in life, liberty, or property. U.S. CONST. amend. XIV, § 1; *Penterman*, 211 Wis.2d at 473, 565 N.W.2d at 530. Powell alleges she had a property interest in continuing the course of study she had begun, and she also alleges what

we construe to be a liberty interest in not unnecessarily disclosing her mental health history.

a. Property interest.

Property interests are not created by the Constitution, but rather, are determined exclusively under state law. *Arneson*, 225 Wis.2d at ----, 592 N.W.2d at 613. Therefore, we must determine whether Powell has sufficiently alleged that she had a constitutionally protected property right under state law to complete her graduate program at UW-Stout. *Penterman*, 211 Wis.2d at 480, 565 N.W.2d at 533 (citing *Riedy v. Sperry*, 83 Wis.2d 158, 164, 265 N.W.2d 475, 478-79 (1978)).

In support of her contention, Powell has alleged that at the beginning of her graduate course of study she disclosed her mental health history to Cook, her academic advisor, and was told that it would not affect her completion of the program; that she achieved a 3.887 grade point average for all courses taken; that she paid all tuition and fees; that she was a student in good standing; and that she borrowed substantial sums of money to enable her to pursue her course of study. She alleges that Cooper and Stoudt wrongfully denied her the opportunity to continue in the graduate program when they refused to assign her to a practicum,
which was necessary to completion of her course of study. We conclude that Powell's complaint contains more than mere conclusory allegations that she had a property right. And as was done in *Riedy*, Powell has alleged particularized facts demonstrating a property right. That property interest could have arisen through promissory estoppel or a contract with UW-Stout.

Several cases interpreting Wisconsin law had clearly established a constitutionally protected property interest in continuing a course of study prior to the conduct of which Powell complains. As early as 1932 in *Frank v. Marquette Univ.*, 209 Wis. 372, 377, 245 N.W. 125, 127 (1932), the supreme court recognized a property interest in the continuance of a college education, holding that

> [t]he law is apparently well settled that a university, college, or school may not arbitrarily or capriciously dismiss a student or deny to him the right to continue his course of study therein. So long as they act in response to sufficient reasons and not arbitrarily or capriciously their acts may not be interfered with by the courts.

Id. While not specifically referred to as a property interest in Frank, the court phrased the claim as one "to compel the defendant university specifically to perform its contract with [Frank]." *Id.* at 377, 245 N.W. at 126. Based upon that claim, the court held that Frank had the right to continue in a course of study, a right that was protected from arbitrary and capricious state action.

In *Martin v. Helsted,* 578 F.Supp 1473 (W.D.Wis. 1983), the Federal District Court for the Western District of Wisconsin addressed a § 1983action alleging that the University of Wisconsin Law School violated Martin's due process and equal protection rights by dismissing him for lying about criminal convictions on his law school application. In analyzing the procedural due process claim, the court concluded that "[c]ourts and state law recognize a property interest in continuing education once a student has begun a course of study." *Id.* at 1480. Even though Martin had only recently been accepted into law school, the court

nevertheless concluded that he enjoyed a property interest in continuing his education, that was protected by some degree of due process. *Id.* at 1482. Additionally, in *Anderson v. University of Wisconsin*, 665 F.Supp 1372, 1396 (W.D.Wis. 1987), *aff'd*,841 F.2d 737 (7th Cir.1988), the court confirmed that a student has a property interest in continuing education once the student has begun a course of study. We therefore conclude that Powell alleged sufficient facts to establish that she had a clearly established property interest in continuing her course of study.

b. Liberty interest.

Powell alleges a constitutional violation because Cooper and Stoudt required her to disclose her mental health history to her practicum supervisor as a condition precedent to continuing in her graduate course of study. We construe this to be a claimed violation of a liberty interest.[3]

Liberty interests may arise under either federal or state law. For example, the Fourteenth Amendment of the United States Constitution protects an "individual interest in avoiding disclosure of personal matters." *Hillman v. Columbia County*, 164 Wis.2d 376, 400 474 N.W.2d 913, 922 (Ct.App.1991) (citing *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977)). This personal liberty interest arises from a "guarantee" under federal law, of certain areas or "zones of privacy." *Borucki v. Ryan*, 827 F.2d 836, 839 (1 st Cir.1987) (citing *Roe v. Wade*, 410 U.S.

[3] The dissent takes issue with our giving a label to what has been alleged, but in a motion to dismiss, the movant can prevail only if there is no way in which the pleadings can be construed to state a claim for relief. *Heinritz v. Lawrence Univ.*, 194 Wis.2d 606, 610-11, 535 N.W.2d 81, 83 (Ct.App. 1995). Therefore, in order to analyze the motion before us, we must articulate in terms of potential legal claims the facts which have been pled.

113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)). The privacy rights that are protected by the Constitution are "limited to those which are 'fundamental' or 'implicit within the concept of ordered liberty' ...." *Borucki*, 827 F.2d at 839 (citations omitted).

In Wisconsin, the legislature has also recognized a right of privacy by creating § 895.50, Stats. Wisconsin courts have reviewed claims for relief based on alleged violations of that statute and on alleged violations of substantive due process grounded in the right of privacy protected by the Fourteenth Amendment. *See Zinda v.Louisiana Pacific Corp.*, 149 Wis.2d 913, 440 N.W..2d 548 (1989); *Hillman*, 164 Wis.2d at 400, 474 N.W.2d at 922. Furthermore, courts in other jurisdictions have recognized a constitutionally protected privacy right in not unnecessarily disclosing mental health information. *See Daury v. Smith,* 842 F.2d 9, 13-15 (1st Cir. 1988) (recognizing the right of privacy in avoiding disclosure of psychiatric records); *National Transp. Safety Bd. v. Hollywood Mem'l Hosp.*, 735 F. Supp. 423, 424 (S.D.Fla.1990) (concluding that avoiding disclosure of psychiatric records falls within the sphere of constitutionally protected privacy); *McKenna v. Fargo*, 451 F.Supp. 1355, 1379-81 (D.N.J.1978) (recognizing a constitutional privacy right extends to emotional and mental conditions). Therefore, we conclude that Powell had a clearly established liberty interest in not unnecessarily disclosing her mental health history. [4]

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[4] The dissent disputes that Powell has any such privacy right because she filed this lawsuit, thereby making her mental health history public. However, the same statement could be made about any plaintiff who seeks to protect a personal right of privacy. Additionally, the dissent's position is undermined by the legislature's enactment of § 895.50, Stats.; this court's decision in *Hillman v. Columbia County*, 164 Wis.2d 374, 400, 474 N.W.2d 913, 922 (Ct.App.1991); and the UnitedStates Supreme

2. *Procedural Due Process.*

Once a property or a liberty interest has been established, it may not be denied without procedural due process. *Goss v. Lopez*, 419 U.S. 565, 577, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Arneson*, 225 Wis.2d at ----, 592 N.W.2d at 619. However, dismissal of Powell's procedural due process claims are appropriate if "the procedures attendant upon the deprivation of [her] interest were [not] clearly established ..., such that reasonable officials in the defendants' positions would [not] have been aware their actions violated" Powell's rights. *Arneson*, 225 Wis.2d at ----, 592 N.W.2d at 615-16.

In determining what procedure was clearly due in 1991, we examine United States Supreme Court, United States Circuit Court and United States District Court opinions because, even though only Supreme Court opinions can establish the law, the opinions of the circuit and district courts give us the shape of the law that has been established. " 'A 'sufficient consensus based on all relevant case law, indicating that the officials' conduct was unlawful' is required.' " *Arneson*, 225 Wis.2d at ----, 592 N.W.2d at 615 (quoting *Henderson v. DeRobertis*, 940 F.2d 1055, 1058-59 (7th Cir. 1991) (further citations omitted)). The determination of what type of process should have been accorded requires the balancing of three factors:

> 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural

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Court's decision in *Whalen v. Roe*, 429 U.S. 589, 599-600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977).

> safeguards; and finally, the Government's interest.'

Arneson, 225 Wis.2d at ----, 592 N.W.2d at 620-21 (quoting Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Furthermore, a determination of what kind of process is due depends on whether Cooper and Stoudt's refusal to assign Powell to a practicum was an academic decision, grounded in Powell's failure to meet one of the academic criteria for continuing in graduate school, or whether it was a disciplinary action, imposed as a consequence of Powell's refusal to disclose her mental health history to her practicum site supervisor, as she was asked to do. *See Board of Curators of Univ. of Mo. v. Horowitz,* 435 U.S. 78, 87, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978).

Here, Powell alleges she was given no oral or written notice of the basis, whether academic or disciplinary, for refusing to permit her to participate in the practicum, or for requiring the disclosure of her mental health history to the practicum supervisor. Additionally, she was not given a hearing. Therefore, because there is no showing in the amended complaint of any procedural due process accorded Powell and because there are too many factual inquiries that must be concluded before we can determine what procedure was due, we conclude Powell's procedural due process claims should not be dismissed based on qualified immunity.

3. *Substantive Due Process.*

Powell also alleges a violation of substantive due process, claiming that Cooper and Stoudt's actions were arbitrary and capricious. As in claims of procedural due process violations, substantive due process claims must be bottomed on an alleged deprivation of a liberty or a property interest protected by the Constitution. *Peterman*, 211 Wis.2d

at 480, 565 N.W.2d at 533. However, substantive due process protects individuals from arbitrary, wrongful actions regardless of the process afforded prior to the deprivation. *Id.* As the Supreme Court has said "the exercise of power without any reasonable justification in the service of a legitimate governmental objective" is the touchstone of a substantive due process violation. County of *Sacramento v. Lewis*, 523, U.S. 833, 118 S.Ct. 1708, 1716 140 L.Ed.2d 1043 (1998).

The criteria used to decide what is impermissibly arbitrary differ, depending on whether the complained of action is legislative or the specific act of a governmental officer. *Id.* When it is the act of government officers, as in the case at bar, " 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' ... or [conduct which] interferes with rights 'implicit in the concept of ordered liberty.' " *Id.* at 1717 (quoting *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952) and *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S.Ct. 149, 82 L.Ed. 288 (1937)).

Here, the liberty interest that Powell asserts in refusing to unnecessarily disclose her mental health history is based upon her personal right of privacy, which the Supreme Court has established is grounded in the right of privacy, implicit in the concept of ordered liberty. *See Whalen*, 429 U.S. at 599. Therefore, Cooper and Stoudt may not interfere with Powell's liberty interest by requiring disclosure of her mental health history unless, on balance, the government's interest in disclosure outweighs Powell's interest in maintaining the privacy of this personal information. *See Hillman,* 164 Wis.2d at401, 474 N.W.2d at 922 (citations omitted). When the balancing of interests is required, a plaintiff faces a high, but not an insurmountable, hurdle in meeting the burden that a defense of qualified immunity invokes. *Arneson*, 225 Wis.2d at ----, 592 N.W.2d

at 621. Because we review only the amended complaint in this motion to dismiss, we have no information before us on the governmental interest in disclosure and whether that interest would be sufficient to override Powell's liberty interest. Because this is a fact- intensive determination not appropriately made in a motion to dismiss, we conclude Powell's substantive due process claim relative to her liberty interest should not be dismissed.

On the other hand, the property right Powell asserts in continuing her course of study would be subject to the "shocks the conscience" standard in a substantive due processschallenge. Negligent conduct is insufficient, as a matter of law, to shock the conscience, but conduct that is intended to injure in some way "unjustifiable by any government interest" will generally be sufficient to satisfy that standard. *County of Sacramento*, 118 S.Ct. at 1718. The third category of conduct, that of deliberate indifference, falls in between the two extremes, and many substantive due process claims are analyzed with reference to this category of conduct. *Id.* However, the Supreme Court has instructed that:

> Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking.
> *Id.* at 1718-19.

A substantive due process claim, based on a property right which arose in an academic setting, was examined in *Regents of Univ. of Misc. v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). There, Ewing had been enrolled

in a special six-year program known as "Inteflex," which was designed to lead to a Doctor of Medicine degree, as well as an undergraduate degree. Part of the program required students to pass a test known as the NBME Part I, which Ewing failed. Ewing asked to repeat the exam, but after repeated hearings, the University remained firm in its decision denying his request. There was no question that the record conclusively showed Ewing had received ample procedural due process. Rather, the question was whether "the University acted arbitrarily in dropping Ewing from the Inteflex program without permitting a reexamination." Because Ewing had failed an exam and because the University had thoroughly reviewed his entire academic record and based its decision refusing to permit him to retake the exam on his overall academic performance, the Court characterized the decision as a "genuinely academic decision." Once that determination had been made the Court opined:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.
> *Id.* at 225 (citation and footnote omitted).

However, if the decision is disciplinary, a substantive due process claim may stand on different footing in an academic setting, as does a claim of the denial of procedural due process. *See Board of Curators of Univ. of Mo.*, 435 U.S. at 87.

There is no allegation in the amended complaint that would cause us to conclude that Cooper and Stoudt intended to harm Powell when they refused to assign her to a practicum. Therefore, in order for a substantive due process claim to lie in regard to Powell's asserted property right to continue in her graduate course of study, Powell must be able to prove that Cooper and Stoudt's refusal to assign her to a practicum was done with deliberate indifference to her rights. *See County of Sacramento, 118 S.Ct. at 1718-1.* However, this is not a determination that can be made in the course of a motion to dismiss becauseit is fact-driven. Therefore, we conclude that Powell's substantive due process claim grounded in her property interest in continuing in her graduate course of studies should not be dismissed.[5]

Statute of Limitations.

Cooper and Stoudt argue that Powell's claim for negligent infliction of emotional distress is barred by the

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[5] When Cooper and Stoudt brought their petition for interlocutory review, Powell agreed that we were obliged to grant it for the issue of qualified immunity due to the supreme court's decision in ***Arneson v. Jezwinski***, 206 Wis.2d, 216, 556 N.W.2d 721 (1996)(***Arneson I***). Additionally, when we granted the petition, we too read ***Arneson I*** as requiring us to grant the petition in regard to the issue of qualified immunity. However, upon further reflection, we read ***Arneson I***, as clarified by a subsequent discussion in ***Penterman***, 211 Wis.2d at Wis.2d at 463, 565 N.W.2d at 526, as requiring us to grant such petitions only when they follow a summary judgment motion, and that in our discretion, we may grant them after a motion to dismiss, if we determine that a decision on the issue of qualified immunity is not premature. We note that in most cases it is better to have the trial court decide such a defense through a motion for summary judgment, after the facts have been further developed, as it would have been in this case. However, because the parties have briefed the issues, because Powell has never argued that the appeal of the issue of qualified immunity is premature, and because the statute of limitations question was ripe for review, we have decided the appeal rather than dismissing it as improvidently granted.

statute of limitations because she did not plead that she discovered her emotional injury within three years of the filing of this lawsuit, and in the alternative, because the discovery rule does not apply to Powell's claim. Powell contends that the discovery rule applies to the accrual of her claim, and that there is no reason not to infer from the pleadings that her claim accrued within three years of the commencement of this action.

Because this affirmative defense is presented to us on a motion to dismiss, the only facts we consider are those presented on the face of the amended complaint,[6] and the reasonable inferences therefrom. *Peters v. Peters Auto Sales, Inc.*, 37 Wis.2d 346, 348, 155 N.W.2d 85, 86 (1967). The statute of limitations for a claim of negligent infliction of emotional distress is three years. Section 893.54(1), Stats. The three-year period begins on the date that the cause of action accrues. Pritzlaff v. Archdiocese, 194 Wis.2d 302, 312, 533 N.W.2d 780,784 (1995). "[A] cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." *Id.* at 315, 533 N.W.2d at 785 (citations omitted). "A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future." *Id.*

While the cause of action usually accrues on the date of the alleged negligent conduct, "under some circumstances, public policy dictates that the date that a cause of action accrues [may] be well after the date of the act that caused harm." *Id.* at 312, 533 N.W.2d at 784. Those circumstances are outlined in the judicially created discovery rule which

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[6] Because Powell filed a complaint and an amended complaint, we have reviewed both documents.

"tolls the statute of limitations until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person." *Id.* at 312, 533 N.W.2d at 785. Further, a "cause of action does not accrue until the nature of the injury *and* the cause-- or at least a relationship between the event and injury--is or ought to have been known to the claimant." *Borello v. U.S. Oil Co.*, 130 Wis.2d 397, 406-07, 388 N.W.2d 140, 144 (1986); *see also Bowen v. Lumbermens Mut. Case. Co.*, 183 Wis.2d 627,632, 517 N.W.2d 432, 434 (1994); *Hammer v. Hammer*, 142 Wis.2d 257, 264, 418 N.W.2d 23, 26 (Ct.App.1987).

The record reflects that Powell commenced this action by the filing of a summons and a complaint on January 24, 1997. An amended complaint was filed June 30, 1997. In the amended complaint, she alleges that, "as a result of the defendants' conduct in denying plaintiff the opportunity to complete her graduate school program" she "did suffer physical injury and emotional distress causing a disabling emotional response to defendants' conduct, resulting in the plaintiffs' (sic) inability to function in other relationships, which was a direct and proximate result of the defendants conduct herein." Powell does not identify when she discovered her emotional injury or even that its discovery was delayed beyond January 28, 1991, when Powell states Cooper and Stoudt refused to permit her to participate in the practicum necessary to the completion of her graduate course of study.

The circuit court inferred from the amended complaint that Powell's emotional distress did not become apparent to her or she did not connect her emotional distress to the alleged wrongs of Cooper and Stoudt until some time after she left the university. However, there is nothing within the four corners of the amended complaint which so states,

or even so implies. After reviewing the amended complaint, one could not reasonably believe that Powell's injury, or knowledge of the cause of her injury, was delayed until at least January 25, 1994,[7] or was delayed at all. Therefore, because § 893.54(1), Stats., requires that actions for negligent infliction of emotional distress be commenced within three years of the date when the claim arose, and because the amended complaint alleges that the last wrongful act occurred on January 28, 1991 and does not allege any delay in Powell's discovery of her tort claim, we conclude that it establishes a statute of limitations defense on its face and her tort claim must be dismissed. If, however, there are any facts within Powell's knowledge which could have been pled which would show that her tort claim accrued no earlier than three years before she commenced this action, the circuit court may, in the exercise of its discretion, permit her to amend the pleadings. Accordingly, we reverse the circuit court's determination on this issue. Additionally, because of our decision in this regard, it is not necessary for us to address the defense of discretionary act immunity which was also aimed at Powell's tort claim.

CONCLUSION

Cooper and Stoudt are not entitled to dismissal of Powell's 42 U.S.C. § 1983 claims based on qualified immunity because Powell has sufficiently alleged a § 1983 claim grounded in procedural and substantive due process violations, including a clearly established property interest in continuing a course of study and a clearly established liberty interest in refusing to unnecessarily disclose her mental health history. Regarding Powell's claim of negligent

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[7] This is the earliest date on which Powell's claim could have accrued and still be preserved by the commencement of this action on January 24, 1997.

infliction of emotional distress, we conclude that the statute of limitations precludes this claim as presently pled. Therefore we affirm in part; reverse in part and remand for further proceedings.

By the Court.-- Order affirmed in part; reversed in part and cause remanded.

Recommended for publication in the official reports.

DYKMAN, P.J., *(dissenting).*

In a case which all panel members agree should not have been taken on interlocutory appeal because of incomplete facts, we learn that the United States Constitution prohibits schools from requiring students to tell a teacher about a personal matter the student has already voluntarily divulged to others at the school. This result is much influenced by procedure--we are reviewing the denial of a motion to dismiss. As a result, we consider only whether Powell's complaint states a claim. On the thin record presented, and without the reasons for the school's direction to the student, the majority concludes that Powell's complaint survives the school's motion to dismiss. The lesson to be learned is that we should usually deny requests for interlocutory appeals from orders denying motions to dismiss, and wait until the matter is more completely presented on summary judgment. Having so concluded, I would dismiss this appeal as improvidently granted.[1]

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[1] I agree with the majority's conclusion that *Arneson v. Jezwinski*, 206 Wis.2d 217, 556 N.W.2d 721 (1996), as clarified in *Peterman v. Wisconsin Elec. Power Co.*, 211 Wis.2d 458, 565 N.W.2d 521 (1997), only requires us to grant petitions for interlocutory review of qualified immunity issues when they follow a summary judgment motion. Although we have the discretion to grant such petitions after a motion to dismiss, to do so here was premature. Neither the majority nor I can

Failing to attract a second vote to dismiss, I will consider the issues on the record presented. I agree with the general principles from which the majority reasons. The Federal Constitution recognizes a right of privacy. *See Griswold v. Connecticut,* 381 U.S. 479, 485-86, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The Due Process Clause protects students' rights to continue their education once they have begun a course of study. *See Goss v. Lopez,* 419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). But the cases upon which the majority relies involve students who have been expelled or disciplined by the schools they attended. Nothing of the sort happened to Powell. The University of Wisconsin did not discipline Powell or expel her. She quit the University. She failed to complete a practicum, and she did not write a Master's thesis. Quitting a teaching position and then suing for damages was an unsuccessful tactic in *Lyons v. Sullivan*, 602 F.2d 7 (1st Cir. 1979), and it should fare no better here.

The majority deems the issue in this case to be "whether Powell has sufficiently alleged that she had a constitutionally protected property right under state law to complete her graduate program." If that were the real issue, this case would be decided by a unanimous panel. *Goss* recognizes that right. The real issue is whether Powell has a constitutional right not to divulge the existence of her bipolar disorder to her practicum instructor, though she revealed the illness to others at the university. Thus, for me, cases such as

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predict the result when the reasons for requiring Powell to divulge her bipolar disorder to another are known. There is nothing stopping the State from now bringing a motion for summary judgment, alleging those reasons, and if unsuccessful, bringing another interlocutory appeal, which we must accept. I do not interpret *Arneson* and *Penterman*, read together, as permitting the State to take two interlocutory appeals in cases such as this.

Frank v. Marquette University, 209 Wis. 372, 245 N.W. 125 (1932), *Martin v. Helstad*, 578 F.Supp. 1473 (W.D.Wis.1983) and Anderson v. University of Wisconsin, 665 F.Supp. 1372 (W.D.Wis.1987), *aff'd*, 841 F.2d 737 (7th Cir. 1988), are unhelpful. In *Frank*, the plaintiff was expelled. *Frank*, 209 Wis. at 374, 245 N.W. at 125. He sued the university, and attempted to discover other students' records to see if he was expelled for actions for which others were not expelled. *See Id.* at 373, 245 N.W. at 125. The court considered Frank's contention that he was entitled to the equality provisions of the federal and state constitutions, and concluded: "Counsel cites no authority to support his contention, and we doubt that any court has ever substantially so held." *Id.* at 378, 245 N.W. at 127. In *Martin*, a student expelled for lying on his application to the school sued, claiming violations of his due process and equal protection rights. *Martin*, 578 F.Supp. at 1475-79. The court concluded that the plaintiff had a property interest in continuing his education, and therefore a procedural due process right to explain his side of the situation. *See Id.* at 1481-82. I agree with this settled law, but it hardly helps decide whether Powell has a constitutional right not to divulge her bipolar disorder to her practicum instructor. *Anderson* is similar to *Martin*, except that the plaintiff in *Anderson* asserted a constitutional right to be re-admitted to the University of Wisconsin Law School after being told that he could not be re-admitted because of his poor grades. *Anderson*, 665 F.Supp at 1390. The plaintiff in *Anderson* asserted much of what Powell asserts; that she has a constitutional right to continue her education. The district court in *Anderson* responded to this assertion:

> The Court does not argue with the plaintiff's contention that a student has a property interest in continuing education once the student has begun a course of study.

> However, the Court believes that plaintiff's contention misses the point. The issue in this case is whether a student who is expelled from school for failing to maintain a required grade average has a property interest in being readmitted to school. Plaintiff has submitted no state statute, university rule, or any other basis that would suggest that a student who is expelled from school for failing to maintain a required grade average has a property interest in a continuing education. *Id.* at 1396.

I believe that the majority opinion should analyze whether Powell has a property right to refuse to tell her practicum instructor of her bipolar disorder. Instead, the majority analyzes whether a student has a property right in continuing his or her education. Of course, the answer to that is "Yes," but that leaves the real question unanswered.

Next, the majority inquires whether Powell has a liberty interest in not disclosing mental health information. This is the first mention of a liberty interest that has occurred in this case. Powell's complaint nowhere asserts anything concerning a liberty interest, though it spends three paragraphs asserting the existence of a property right, the deprivation of a property right and the violation of a property right. There is no indication that anyone asserted or even discussed liberty interests in the trial court. The trial court's decision fails to mention the term "liberty," though the words "property interest" are used thirteen times in its thirteen-page decision. "Liberty" is absent from the words found in the appellant's brief, and the respondent never uses that word or analyzes an alleged liberty interest in the brief she filed. However, her brief uses the term "property interest" or "property right" eighteen times in its twenty-three pages. The majority "construes" Powell's complaint to allege a liberty

interest in not unnecessarily disclosing her mental health history. One could construe a hot dog to be a porterhouse steak by saying so, but I cannot see how Powell's total indifference for liberty interests in the trial court and here can be construed as an assertion that she has been deprived of a liberty interest.

Appellate courts do not ordinarily become advocates for either side of a case. We are ill advised to perform counsel's task. *See Zintek v. Perchik* 163 Wis.2d 439, 482, 471 N.W.2d 522, 539 (Ct.App.1991), *overruled on other grounds by Steinberg v. Jensen,* 194 Wis.2d 439, 534 N.W.2d 361 (1995). "We cannot serve as both advocate and judge." *State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 Ct.App.1992). We are not to develop an appellant's argument. *See* State v. West, 179 Wis.2d 182, 195-96, 507 N.W.2d 343, 349 (Ct.App.1993), *aff'd,* 185 Wis.2d 68, 517 N.W.2d 482 (1994). We have been told that "[o]ne of the rules of well nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal." *Vollmer v. Luety*, 156 Wis.2d 1, 10, 456 N.W.2d 797, 802 (1990) (quoting *Cappon v. O'Day*, 165 Wis. 486, 490, 162 N.W. 655, 657 (1917)). And "skewing normal procedure to protect ... *pro se* litigants from inadvertently forfeiting their rights" is a procedure which applies only to *pro se* prisoners. *Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992). Clearly, we should not do so when a party is represented by counsel.

I agree that motions to dismiss are to be liberally construed, and that a claim will only be dismissed if the plaintiff cannot recover under any circumstances. *See Heinritz v. Lawrence University*, 194 Wis.2d 606, 610-11, 535 N.W.2d 81, 83 (Ct.App.1995). I do not agree that this makes us a surrogate for plaintiff's counsel. I know of no

case holding that a plaintiff may file a complaint, and when faced with a motion to dismiss, ask the trial court to find him or her a cause of action, and if unsuccessful, ask this court and the supreme court to do likewise. We expect a litigant faced with a motion to dismiss to tell the court by brief or oral argument what claims he or she is making. Neither trial nor appellate courts should be required to search all possible areas of Wisconsin law to see whether a plaintiff might have pled a cause of action. Concepts of waiver should and do prevent this from becoming a successful maneuver.

> This is what we concluded in *State v. Bollig*, 222 Wis.2d 558, 587 N.W.2d 908 (Ct.App.1998). There, Bollig filed a motion to dismiss the civil commitment proceedings against him. *See Id.* at 562, 587 N.W.2d at 909. The State failed to make two arguments in the trial court which it made for the first time on appeal. *See Id.* at 564, 587 N.W.2d at 910. We gave the State's newly made arguments no credence: Arguments that are raised for the first time on appeal by an appellant are deemed waived....
> The State did not ... contend that Mochalski was a de facto special prosecutor.... De facto authority was not argued or even mentioned until the State submitted its brief to this court. Therefore, we must conclude that the State has waived [its] argument[ ].

Id. at 564-65, 587 N.W.2d at 909.

There is no difference between the State's failure to make an argument in *Bollig* and Powell's failure to make an argument in this case, except that here, Powell *never* made the argument that she has a liberty interest in not further

revealing her bipolar disorder. That is hardly cause to depart from our reasoning in *Bollig*.

One of the risks of *sua sponte* consideration of an issue is that we will not have the benefit of a true advocate's view of the issue and his or her research, and we are deprived of the informed thinking of the trial judge. This can, and often does result in hardship for one of the parties. *See Vollmer*, 156 Wis.2d at 11, 456 N.W.2d at 802. When we later review a case in which this was done, we often regret our decision to strike out on our own. When we raise an issue sua sponte and then decide it, we are often surprised to first read of contrary authority in a petition for review. Still, a dissent responds to the reasoning of the majority, and I must either ignore the issue or address it. I choose the latter, though reluctantly.

Anything can fall within a concept of "ordered liberty" if a court says that it does. The majority starts by citing Powell's never-asserted contention that she has a right of privacy in refusing to unnecessarily disclose her mental health history. This is wrong as a matter of fact. The trial court noted that Powell's complaint alleges that she voluntarily told two individuals at the University about her bipolar disorder. What Powell really asserts is that although she had no objection to two individuals knowing of this, she draws the line at three. Moving then from Powell's non-asserted assertion, the majority concludes: "Therefore, Cooper and Stoudt may not interfere with Powell's liberty interest by requiring disclosure of her mental health history...." Cooper and Stoudt did no such thing. Powell had already disclosed her mental health history. If a constitutional right must be found on the facts of this case, it has to be a right not to tell too many people of one's bipolar disorder.

The Supreme Court has recently cautioned against expanding the Due Process Clause into new areas. In *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) the Court said:

> But we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking" that direct and restrain our exposition of the Due Process Clause. *Id.* at 2267-68 (alteration in original) (citations omitted).

The cases the majority cites as authority for its conclusion are not persuasive to me. *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), indeed acknowledges an individual interest in avoiding disclosure of personal matters. That interest was articulated in *Griswald v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), where the Court invalidated a Connecticut law criminalizing the use of contraceptive devices, and providing for the prosecution of doctors who prescribed them. Visualizing police searches of marital bedrooms for signs of the use of contraceptives, the Court concluded that a right of privacy older than the Bill of Rights prevented Connecticut from interfering with a married couple's decision to use contraceptives. *See Id.* at 515-16. But neither *Griswold* nor *Whalen* suggested that *any* information pertaining to a person, whether known by others or not, was constitutionally protected from revelation beyond the persons with whom one chooses to share one's secrets.

Whalen held that the State of New York could require doctors to reveal to the state the names and addresses of patients for whom they had prescribed drugs which had both legal and illegal uses. *Whalen*, 429 U.S. at 605. The Court spoke of a "host of other unpleasant invasions of privacy that are associated with many facets of health care." *Id.* at 602. It concluded that the slight risk inherent in revealing private health information was not a reason to invalidate New York's requirement. *See Id.* at 601-02. I view the university's requirement that Powell reveal her bipolar disorder to one more person similarly. This is not a significant enough intrusion into a private matter to entitle Powell to the protection of the United States Constitution.

The other case upon which the majority relies to conclude that the United States Constitution prohibited Cooper and Stoudt from requiring that Powell tell her

practicum instructor of her bipolar disorder is *Hillman v. Columbia County*, 164 Wis.2d 376, 474 N.W.2d 913 (Ct.App.1991), *review granted,* 482 N.W.2d 105 (1992).[2] In *Hillman*, the plaintiff, a jail inmate, asserted that some jail employees had told other jail employees and jail inmates that Hillman was HIV positive. Id at 384, 474 N.W.2d at 916. We quoted *Woods v. White*, 689 F.Supp. 874 (W.D.Wis.1988), *aff'd,* 899 F.2d 17 (7th Cir.1990), for its observation that the AIDS virus is closely related to sexual activity and intravenous drug use, and that this is information of the most personal kind. *See id.* at 401, 474 N.W.2d at 923. We cited two other cases coming to the same conclusion, both dealing with the AIDS virus. *See Id.* at 401-02, 474 N.W.2d at 923. In *Hillman*, the persons allegedly receiving the private information were fellow prisoners and jail employees. Hillman's HIV positive status was therefore known by persons who could hardly be expected to keep this information confidential. AIDS is unique in that the attitude of some about this disease is extreme and rejecting. I find no analogy between the revelation of Hillman's illness to persons who at best didn't care and at worst could be expected to berate or injure Hillman, and the revelation of a bipolar disorder to one more person--a professional who would be expected to keep this information confidential.

My examination of the cases upon which the majority relies is not just to show that they do not support the majority's conclusion. Qualified immunity provides government officials performing discretionary functions with protection, shielding them from civil damage liability if

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[2] I question whether today, *Hillman* would withstand the analysis set out in *Washington*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772. And it is strange to charge Cooper and Stoudt with knowledge of *Hillman* in January of 1991, when the court of appeals did not decide *Hillman* until August 1991. *Hillman*, 164 Wis.2d at 376, 474 N.W.2d at 913.

"their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct 3034, 97 L.Ed.2d 523 (1987).[3] The plaintiff must prove that the right he or she asserts was "clearly established" at the time it was allegedly violated. Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341,106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Generalized assertions of a constitutional right are insufficient.

The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right.... But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow [v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)]. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.... It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The

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[3] Anderson v. Creighton, 486 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), is not the only case to identify and discuss this requirement. *See also Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); *Lojuk v. Johnson*, 770 F.2d 619 (7th Cir. 1985); *Colaizzi v. Walker*, 812 F.2d 304 (7th Cir.1987) and a couple of others.

contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre- existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 639-40 (citation omitted).

The majority has done what *Anderson* warns we should avoid. By using a degree of generality ("whether Powell has sufficiently alleged that she had a constitutionally protected property right under state law to complete her graduate program") instead of the proper "particularized, and hence more relevant sense" (whether Powell has a constitutional right not to be required to tell an instructor of a mental disorder), the majority has transformed the guarantee of immunity into a rule of virtually unqualified liability. Cooper and Stoudt certainly should have known that they could not lawfully dismiss Powell from her graduate program; that question is similar to requiring them to know that they could not deprive her of due process of law. But *Anderson* explains that this is not the question to ask. When the correct question is asked, the majority cites no case which answers the question affirmatively, and I have found none. If both the majority and I have found no cases upholding Powell's alleged right, Cooper and Stoudt certainly should not be held to be aware of the right in January of 1991, long before *Hillman* was decided in August 1991. *Hillman*, 164 Wis.2d at 379, 474 N.W.2d at 913.

As *Whalen* recognizes, there are a host of unpleasant invasions of privacy which do not automatically amount to an impermissible invasion of privacy. The "right of privacy is a narrow right." *Safe Water Ass'n v. City of Fond du Lac*, 184 Wis.2d 365, 367, 516 N.W.2d 13, 17 (Ct.App.1994).

Under some circumstances, the unauthorized revelation of a person's bipolar disorder might be a violation of a person's right to due process but it is not here. Powell is not seeking re-admission to the University or a declaration that she need not reveal her bipolar disorder to anyone. She wants money. She is now willing to reveal her bipolar disorder to the world through this lawsuit. I am not willing to join in the majority's *sua sponte* determination that Powell has a liberty interest in not disseminating to one more person the information she voluntarily provided to the University. In my view, Powell does not have either a liberty or property interest in not further revealing the fact of her bipolar disorder to her practicum instructor. Therefore, Cooper and Stoudt were entitled to qualified immunity and Powell's complaint should have been dismissed. Accordingly, I respectfully dissent.

STATE OF WISCONSIN DANE COUNTY

CIRCUIT COURT BRANCH 17

CONNIE G. POWELL

Plaintiff,

vs. Case No. 97-CV-1151

ARLENE M. COOPER
and CALVIN STOUDT,

Defendants.

MEMORANDUM DECSION AND ORDER

Connie G. Powell (plaintiff) filed an action seeking judgment and damages against Dr. Arlene M. Cooper and Dr. Calvin Stoudt (defendants) for violating, her civil rights and negligently inflicting emotional distress. The defendants have filed a Motion to Dismiss the Complaint alleging that it fails to state a claim upon which relief may be granted. For the reasons set forth the Motion to Dismiss is denied.

Facts

According to the amended complaint, the plaintiff was admitted to the graduate student program in guidance and counselling at the University of Wisconsin-Stout in the fall of 1987. The plaintiff concentrated in the area of alcohol

and other drug, abuse counseling. At the time of her admission, the plaintiff was assigned Dr. David Cook as an academic advisor. Also at that time, the plaintiff disclosed to Dr. Cook the fact that she had a history of suffering from a manic depressive disorder. Dr. Cook indicated to the plaintiff that her condition would not affect her completion of the graduate program at UW-Stout.

By January, 1991, the plaintiff had successfully completed all of the course work required of the Master's Degree program in guidance and counseling. The plaintiff had yet to complete the required practicum and master's thesis.

In December, 1990, the plaintiff was sent by Dr. Cook to speak with defendant Dr. Cooper regarding the plaintiffs practicum assignment for the spring of 1991. At that time, the plaintiff disclosed to Dr. Cooper that she suffered from a manic depressive disorder. Up on receiving this information, Dr. Cooper refused to schedule the plaintiff for a practicum assignment.

On January 28, 1991, the plaintiff met with defendants Dr. Cooper and Dr. Stoudt. At this time, the plaintiff was told by the defendants that she would be allowed to undertake a graduate student praticum only if she agreed to disclose to the practicum site supervisor the fact that she was suffering from a manic depressive disorder. Dr. Stoudt is alleged to have known approved, and supervised the offering of the praticum on the condition that the plaintiff must first disclose the fact that she suffers from a manic depressive disorder to the site supervisor.

The plaintiff refused to make the required disclosure and therefore was not allowed to undertake and complete the praticum, requirement, which also resulted in her being

unable to complete the graduate school program at UW-Stout.

The plaintiff alleges that she had a property interest in completing her graduate school education that the arbitrary and capricious action of the defendants denied the plaintiff her due process rights which are guaranteed by the United States Constitution. The plaintiff further alleges that the actions of the defendants were willful wanton and in reckless disregard of her rights. Finally, the plaintiff alleges that the defendants' conduct was negligent and directly and proximately resulted in the plaintiff suffering physical injury and emotional distress.

Standard of Review

The purpose of the Complaint is to give notice of the claim. Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731 (1974). The purpose of the motion to dismiss for failure to state a claim is to rest the legal sufficiency of the complaint. The facts pled are taken as admitted. Evans v. Cameron, 121 Wis.2d 421. 426 (1985). The pleading's are to be liberally construed and should be dismissed as legally insufficient only if it is quite clear that under no circumstances can plaintiff recover. Evans, 121 Wis. 2d. at 426. Plaintiff can rely on the facts pled and reasonable inferences from the pleadings. However, legal conclusions and unreasonable inferences are not considered. Hartridge v. State Farm Mut. Auto Ins. Co., 86 Wis. 2d 1, 4. 271. N.W.2d 598 (1978).

Discussion

The defendants propose nine arguments in support of their motion to dismiss for failure, to state a claim:[4] (1) there

[4] The court notes that the defendants' Reply Brief raises additional arguments in response to the plaintiff's Brief in Opposition. These

is no constitutionally protected property interest in a graduate school education. (2) there is no constitutional IV protected property interest in refusing to disclose a mental illness to a practicum instructor, (3) the decision by the defendants to require disclosure was not arbitrary and capricious, (4) the matter at issue was academic in nature and did not require a due process hearing, (5) the defendants enjoy qualified immunity from this suit, (6) Dr. Stoudt was not personally involved in the deprivation of the plaintiff's rights and is therefore not liable, (7) as Dr. Cooper's supervisor, Dr. Stoudt cannot be vicariously liable for the tort claim, (8) the statute of limitations bars the negligent infliction of emotional distress claim, and (9) the plaintiff has failed to cite the specific ministerial duty breached by the defendants, and. therefore the negligent infliction of emotional distress claim should be dismissed according to the doctrine of discretionary act immunity. This opinion will address each argument in turn.

The defendants' first argument is that there is no constitutionally protected property interest in a graduate school education. The defendants are wrong. The United States Supreme Court, the Seventh Circuit and the Wisconsin Supreme Court have consistently assumed that such a right exists. In Board of Curators Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) a medical student filed suit to challenge her expulsion from medical school for poor performance. For the purposes of the decision the Court assumed that the medical student had a property interest in. completing her education

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additional arguments will not be considered as the court does not find any of the original arguments persuasive. In addition, the court admonishes the defendants for filing a twenty-page reply brief in this matter. According to Dane County Circuit Court Rules reply briefs are limited to

to thirteen typewritten pages unless otherwise ordered by the court. At no time did this court order, nor consider, a waiver of this page limit.

in order to pursue a medical career, yet found that she was awarded "at least as much due process as the Fourteenth Amendment requires." Id. at 85.

Likewise, the Court in Regents of Universitv of Michigan v., Ewing, 474 U S. 214 (1985), was faced with the plight of a medical student who was dismissed from school for failing to meet academic standards. Again, for the purposes of the decision, the court assumed that the medical student had a constitutionally protectable property interest in continued enrollment but that even if the "assumed property interest gave rise to substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action." Id. at 223.

The two federal judges in the Western District of Wisconsin have been more affirmative in asserting that a property interest in continuing an education exists. In Martin v. Helstad, 57S F.Supp. 1473 (W.D. Wis. 1983), Judge Crabb cited Horowitz, among other sources, in support of her contention that "[c]ourts and state law recognize a property interest in continuing education once a student has begun a course of study," Id. at 1480 (citations omitted). The issue in Horowitz was whether a person who had lied on his admissions application and was then offered and accepted admission to law school, had a constitutionally protected interest in commencing that education. Judge Crabb found that an interest existed, but also found that the prospective student had been provided all of the due process to which he was entitled.

In Anderson v. University of Wisconsin, 665 F.Supp. 1372 (W.D. Wis. 1987), Judge Shabaz did "not argue with the plaintiff's contention that a student has a property interest in continuing education once the student has begun a course

of s study. " Id. at 1396. However, the court also found that a student who has been expelled from school for failing to maintain a required grade average no longer has a property interest in continuing his or her education.

In 1932, the Wisconsin Supreme Court stated that "the law is apparently well settled that a university, college. or school may not arbitrarily or capriciously dismiss a student or deny to him the right to continue his course of study therein." Frank v. Marquette University,. 209 Wis. 372, 377 (1932). The basis of Frank's case was that the University acted unreasonably, arbitrarily and capriciously when it refused to allow him to graduate from medical school. However, the case was before the court on a motion to determine whether the plaintiff was entitled to obtain disciplinary records held by the University in relationship to alleged actions taken against other University students. The court found that the records were immaterial to the merits of the controversy.

It appears that courts have been reluctant to specifically state whether a student has a constitutionally protected property interest in continuing an education. This reluctance is probably best explained by the Ewing court, which recalled Justice Brandeis' admonition "not to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 474 U.S. at 222 (citation and internal quotations omitted). Although courts may wisely refuse to make broad constitutional declarations when the facts before them do not require such findings, it is quite clear that courts have repeatedly and consistently assumed that' a student has a constitutional property interest in continuing his or her

education. Contrary to the defendants' contentions this fact is strong evidence that the interest does exist.[2]

As for this case the plaintiff has alleged numerous facts which if true establish that she had a property interest in continuing her graduate school education. The plaintiff was rightfully admitted to the school, paid her tuition achieved acceptable grades and maintained her good standing as a graduate student. The plaintiff is not alleged to have violated any rule, regulation or policy (academic or otherwise) of the University. Unlike the plaintiffs in any of the aforementioned cases, the plaintiff has done nothing deceitful to cause her to be removed from the school, nor has she failed to perform at academically acceptable standards. Based on the facts plead in the Complaint and other documents filed herein it appears plaintiff has satisfied all requirements for continued graduate study. The only exception is the alleged arbitrary and capricious requirement by defendants that plaintiff disclose her mental illness to the practicum site supervisor without any justified or supported basis. The Complaint establishes at the least that the disclosure requirement exceeded any legitimate academic or regulatory/policy purpose absent an independent basis for its imposition. Therefore, the court finds that this plaintiff has alleged facts sufficient to establish that she has a constitutionally protected property interest in her graduate school education.

The defendants' second argument that there is no constitutionally protected property, interest in refusing to disclose a mental illness to a practicum instructor, fails for essentially the same reasons noted above. The defendants

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[2] Futhermore the court is dismayed at the defendants' blatant misstatement of the law on this point, particularly with respect to the Seventh Circuit's decision on an appeal of a preliminary matter in the Martin case.

attempt to rely on Judge Shabaz' decision in the Anderson case to support their contention that the plaintiff needs to cite a "state statute, university rule or any other basis" to sustain her claim. As set forth above, the court has analyzed the existing federal and state case law and has found that the plaintiff has a constitutionally protected property interest in her graduate school education furthermore, as will be discussed below, the plaintiff has alleged that the defendants deprived her of her substantive due process rights by acting arbitrarily and capriciously. This is all that is required in order for the complaint to survive a motion to dismiss.

Furthermore the crux of the Anderson decision was whether a student who was expelled for failing to maintain required academic standards had an interest in begin readmitted to school; the court had already acknowledged that the student would have had a constitutionally protected interest in continuing his education had he not been expelled. The plaintiff in this case has not been expelled therefore Anderson does not require her to do more than assert her right to continue her education in the absence of constitutional interference.

The defendants' third argument, which addresses the plaintiff's substantive due process claim, is that the decision by the defendants to require disclosure was not arbitrary and capricious. In support of this argument the defendants first allege that the plaintiff was "simply asked to provide the same information about her mental illness to her practicum supervisor that she had volunteered to many others -at the university. " (Defendants' Brief, p. 12-13.) This assertion clearly misses the point and is wrong for a number of reasons. First, according to the complaint, the plaintiff alleges that the defendants conditioned her participation in the practicum on the requirement that she disclose the fact that she suffered from a manic depressive disorder to the site

supervisor not that she was "simply asked" to provide that information. Second, it is an overstatement for the defendants to state that the plaintiff had told "many others" about the fact that she suffers from a manic depressive disorder when the complaint alleges that she told only two individuals at the university about this. Third and most importantly this allegation does not address and in no way negates the plaintiff's allegation that the decision by the defendants to require disclosure was arbitrary and capricious. Certainly it may have been a simple" thing for plaintiff to do, however that assertion is tantamount to arguing that an individual who is discriminated in his or her housing selection could simply look for another house is an acceptable argument in our civil rights jurisprudence. Defendants' third argument fails.

The defendants also allege that "[i]t is obvious from the [defendants' proposed definition of "bipolar disorder"] that [the plaintiffs] site supervisor would need to know of her condition." (Defendants' Brief, p. 13.) The court finds that the defendants' attempt to introduce a generic dictionary definition of "bipolar disorder" as evidence that they did not act in violation of the plaintiff's substantive due process rights is misguided and borders on being offensive. Frankly it begs the question. The fact that the defendants are willing to admit that they see the plaintiff as no more than a standard dictionary definition of a mental illness is more persuasive as evidence that they did indeed act arbitrarily and capriciously in the manner in which they treated her. The court finds that the plaintiff has sufficiently alleged that the defendants acted arbitrarily and capriciously when they required her to disclose to her practicum, site supervisor that she suffers from manic depression.

Furthermore, it appears at this early stage in the proceedings that defendants imposed the disclosure

requirement without examining plaintiff's specific circumstances to determine, first whether plaintiffs history could support such a requirement. For example, should plaintiff's p history reveal problems working with others in a counseling setting due to her mental illness, it is arguable defendants may have a legitimate basis for requiring disclosure to the practicum site supervisor. However, thus far, the pleadings do not reveal defendants rook these preliminary steps before informing plaintiff of the disclosure requirement. Plaintiff has established a claim under 42 U.S.C. sec. 1983 for a violation of the due process rights.

Because the court finds that the plaintiff has stated a valid §1983 cause of action on the basis that the defendants deprived her of her substantive due process rights it is unnecessary, to address the defendants' fourth argument which alleges that the matter at issue was academic in nature and did not require a procedural due process hearing.

The defendants' fifth argument is that they enjoy qualified immunity from this suit. The doctrine of qualified immunity provides that officials "are shielded from liability for civil damages insofar as their conduct dues not violate clearly established statutory or constitutional rights of which a reasonable per-son would have known" Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). (citations omitted). The Harlow court determined that, on summary judgment the judge may determine "not only the currently applicable law, but whether that law was clearly established at the time an action occurred." Id. While the posture of this case is not one of summary judgment, the court believes that it is proper and indeed necessary, for it to determine the current law and whether it was clearly established at the time the alleged action occurred.

As stated above the court has located a consistent-line of cases which acknowledge that a student has a constitutionally protected property interest in continuing an education. Furthermore according, to the Fifth Amendment to the United Stares Constitution a person cannot be deprived of that property without due process of law. The court finds that the law was clearly established at the time in question and that the defendants are properly charged with knowing that law and complying with it: the court will nor Errant the defendants qualified immunity in this case.

The court will address the defendants' sixth and seventh arguments together as both are based on the notion that Dr. Stoudt should be individually relieved from liability. Specifically as to the constitutional claim, the defendants argue that Dr. Stoudt was not personally involved in the deprivation of the plaintiff's rights and therefore not liable; as for the personal injury claim, the defendants argue that, as, Dr. Cooper's supervisor, Dr. Stoudt cannot be held Vicariously liable.

The complaint alleges that "Dr. Stoudt knew plaintiff would be offered a practicum on the sole condition that she disclose her manic depressive condition. Dr. Stoudt approved of this conditional practicum and supervised Dr. Cooper in offering said conditional practicum to plaintiff's (amended complaint ¶15). Based upon the allegations in' the complaint, it is reasonable for this court to infer that Dr. Stoudt was involved in the alleged deprivation of the plaintiff's' rights to the extent necessary to withstand a motion to dismiss. Likewise, the facts alleged in the complaint are sufficient to raise an inference that Dr. Stoudt may have been more than just vicariously attached to the actions of Dr. Cooper. At this stage of the proceedings, it is simply impossible for this court to determine that Dr. Stoudt was not personally responsible for the alleged causes of

action and therefore dismissing Dr. Stoudt from the action at this time would be premature.

The defendants' eighth argument is that the statue of limitations bars the negligent infliction of emotional distress claim. In Wisconsin, an action to recover for personal injuries must be commenced within three years or be barred. Wis. Stat. § 893.54(1). The action taken by the defendants is alleged to have occurred on January, 28. 1991. The plaintiff's action was first filed on January 24, 1997. Although six years elapsed between the time of the incident alleged to be negligent and the time of the filing of the complaint this fact alone does not warrant, dismissal of the plaintiff's claim.

In 1983, the Wisconsin Supreme Court adopted the rule which expands the possibilities for determining when a cause of action for, personal injury accrues. In Hansen v. A. H. Robins. Inc., 113 Wis. 2d 550 (1983), the court set forth the discovery rule as follows: a claim does not accrue until the injury is discovered or in the exercise of reasonable diligence should be discovered. Id. at 556. In this case the plaintiff does not specify when the alleged injury was discovered, therefore it is possible that the injury, was not discovered or should have been discovered until a significant time after the date of the alleged negligent act. For this reason, it would be inappropriate for the court to dismiss the plaintiff's negligent infliction of emotional distress claim at this time.

Finally, the defendants argue that they are immune from liability for negligent actions according to the doctrine of discretionary immunity. The general rule in Wisconsin is that public employees "are immune from liability for damages resulting from their negligence or unintentional fault in the performance of discretionary functions. " Lister

v. Board of Regents, 72 Wis.2d 282, 301 (1978). However, public employees are liable for damages which result from the negligent performance of purely ministerial duties. Id. at 300-301. A duty is ministerial only if it is "absolute certain and imperative involving merely the performance of a specific task when the law imposts prescribes and defines the time, mode and occasion for its performance with such certain, that nothing, remains for judgment or discretion. " Id. at 301.

In this case the plaintiff has alleged that the defendants had a duty to administrate her graduate degree the program without the occurrence of negligent actions on their part. The court does not believe that this allegation in and of itself. is sufficient to establish that the defendants had a ministerial duty to not engage in negligent administration. However, the court does find that the complaint, construed most liberally and considered in its entirety, doe's at least allege that the defendants may have had a ministerial duty to schedule the plaintiffs practicum assignment without imposing the additional burdei of having to disclose to the practicum supervisor that she suffers from manic depression. It is clear to the court that potential circumstances exist which would allow the plaintiff to recover for her negligent, infliction of emotional distress claim and that it would therefore be premature to dismiss her claim at this stage of the proceedings.

Conclusion

For the reasons set forth the defendants' Motion to Dismiss is denied.

Dated this 23rd day of December,1997.

BY THE COURT:
/s/ Paul Higginbotham
Judge Paul Higginbotham
Dane County Circuit Court-Branch 17

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT BRANCH 17

Connie G. Powell, Case No. 97 CV 1151

Plaintiff,

vs. **AMENDED**[1] COMPLAINT

Dr. Arlene M. Cooper,
Dr. Calvin Stoudt, Case Classification

Defendants. Money Judgment 30301

Pursuant to § 802.09(l), Wis. Stats, the plaintiff amends her complaint as follows:

PARTIES

1. The Plaintiff is an adult resident of the State of Oregon, residing at 1913 23rd Ave. #4, Forest Grove, OR 97116

2. The Defendant, Dr. Arlene Cooper, is an adult resident of the State of **Minnesota, residing in Red wing, Minnesota, a Phd. in the field of psychology, an experienced educator in counseling instruction,** and at all times material to this action, was an assistant professor of counseling and psychological services at the University of Wisconsin-Stout, located in Menomonie, Wisconsin.

---

[1] Amended portions of complaint are highlighted

3. The Defendant, Dr. Calvin Stoudt, is an adult resident of the State of Wisconsin, residing at E4569 479th Ave., Menomonie, WI 54751, **a Phd. in the field of psychology, an experienced educator in counseling instruction**, and at all times material to this action, was the program director for the School of Guidance, Counseling and Psychological Services at the University of Wisconsin-Stout, in Menomonie, Wisconsin, **and in such position the supervisor of Dr. Cooper.**

CIVIL RIGHTS CAUSE OF ACTION

4. This civil rights litigation is brought pursuant to the 42 U.S.C. 91983, the United States Constitution and the Fourteenth Amendment to the United States Constitution.

5. The defendants, at all times material to this action, were duly appointed and qualified agents and employees of the State of Wisconsin, acting as hereinafter set forth in their respective capacity as stated and acting under color of statutes, regulations, custom, policy, and usage of the State of Wisconsin and the University of Wisconsin system.

6. Each of the defendants herein acted under color of law in depriving the plaintiff of her rights under the Constitution of the United States, causing the plaintiff to suffer damage and injury.

7. In the fall of 1987, plaintiff was admitted to the Graduate College of the University of Wisconsin-Stout, Menomonie, Wisconsin, in a graduate student program for a Master's Degree in guidance and counseling, with a concentration in alcohol and other drug abuse counseling, **which created an implied contract that plaintiff would receive her graduate degree if she paid her tuition, achieved required grades and maintained her good**

standing as a graduate student. Said contract was subsequently breached by the defendant not allowing plaintiff to undertake her graduate practicum. without disclosing her manic depressive disorder to her site supervisor.

8. At the time of plaintiffs' admission to said Graduate College, the plaintiff was assigned Dr. David Cook, as an academic advisor, to whom the plaintiff disclosed the fact the plaintiff had a history of suffering from a manic depressive disorder. **Plaintiff was advised by Dr. Cook that her manic-depressive condition would not affect the completion of plaintiff's graduate program at U.W. Stout.**

9. **At the time plaintiffs, admission to said graduate degree program, nor thereafter until December of 1990, no staff member at the University of Wisconsin-Stout advised plaintiff that her manic depressive condition would, in any way, interfere with the completion of plaintiffs, graduate school program at the University of Wisconsin-Stout.**

10. Subsequent to plaintiffs, admission to said graduate program, the plaintiff completed all of the course work required for a Master's Degree in guidance and counseling with the exception of the plaintiff's practicum and master's thesis.

11. **In January of 1991,** the plaintiff's official transcript from the University of Wisconsin-Stout shows the plaintiff has a cumulative grade point of 3.887 in all course work completed in said graduate program, **had paid all tuition and fees due, and was a graduate student in good standing at the University of Wisconsin-Stout.**

12. In December of 1990, the plaintiff was sent by plaintiffs, academic advisor, Dr. David Cook, to speak to Dr. Arlene Cooper, concerning the scheduling of plaintiffs, graduate student practicum for the spring of 1991.

13. Upon disclosure to Dr. Cooper by the plaintiff that plaintiff was suffering from manic-depressive disorder, Dr. Cooper refused to schedule plaintiff into the graduate student practicum program in guidance and counseling.

14. On January 28, 1991, plaintiff met with Dr. Cooper and Dr. Stoudt, at which meeting the plaintiff was told that plaintiff would be allowed to undertake a graduate student practicum only if plaintiff agreed to disclose the fact that plaintiff was suffering from a manic depressive disorder to any site supervisor for plaintiff's graduate school practicum.

15. Prior to said meeting, Dr. Stoudt knew plaintiff would be offered a practicum on the sole condition that she disclose her manic depressive condition; Dr. Stoudt approved of this conditional practicum and supervised Dr. Cooper in offering said conditional practicum to plaintiff at said meeting.

16. Shortly before issue of scheduling of plaintiff's practicum arose, Drs. Cooper and Stoudt had experienced problems with the practicum, for another graduate student at the University of Wisconsin-Stout with a manic depressive disorder, as a result of which Dr. Cooper and Stoudt conspired to force plaintiff out of her graduate program with the motive and intent to avoid any potential problems that might arise in the future regarding plaintiff's practicum.

17. Upon plaintiff's refusal to disclose plaintiffs, manic-depressive disorder to any practicum site supervisor for

plaintiffs' graduate student practicum, plaintiff was not allowed to undertake and complete plaintiffs' graduate school practicum, and as a consequence, plaintiff could not complete her graduate school program at the University of Wisconsin-Stout.

18. Denial of plaintiff the opportunity to undertake and complete her graduate school practicum was without any hearing or other procedural due process to determine the necessity for the disclosure of plaintiffs, manic depressive disorder to plaintiffs, practicum site supervisors, **the effect of said disclosure on plaintiff, or any alternatives to said disclosure; and was the arbitrary and capricious whim of the defendants, and constituted a dismissal of plaintiff from her graduate program.**

19. Plaintiff had a constitutionally protected property **right in the continuance** of her graduate school program at the University of Wisconsin-Stout, which could not be denied plaintiff without procedural due process, **there being little administrative or fiscal burden on the University of Wisconsin-Stout in providing plaintiff with a due process hearing;**

20. Plaintiff was deprived of said constitutionally protected property right by the defendants without procedural due process as guaranteed by the United States Constitution and the 14th Amendment to the United States Constitution.

21. Defendants violated the plaintiffs' property rights in her education and plaintiffs' procedural due process rights under the United States Constitution and the 14th Amendment to the United States Constitution.

22. The plaintiff borrowed substantial sums of money and expended said sums on plaintiffs' graduate program at the University of Wisconsin-Stout, which plaintiff has had to repay or is in the process of repaying.

PUNITIVE DAMAGE CAUSE OF ACTION

23. The allegations set forth in paragraphs 2 through 20 are set forth herein by reference.

24. The conduct of the defendants, as set forth in paragraphs 13 and 14 herein was willful, wanton and in reckless disregard of the rights of the plaintiff to a graduate school education at the University of Wisconsin-Stout.

25. The conduct of the defendants was undertaken by the defendants will full knowledge that by denying plaintiff participation in a graduate school practicum, the defendants were denying plaintiff the opportunity to complete here graduate school program at the University of Wisconsin-Stout.

NEGLIGENT EMOTIONAL DISTRESS CAUSE OF ACTION

26. The allegations set forth in paragraph 2 through 20 are set forth herein by reference.

27. The defendants knew or should have known, as psychologists and members of the staff for the Department of Guidance and Counseling at the University of Wisconsin-Stout, that as a result of the denial of plaintiffs' opportunity to complete a graduate school program at the University of Wisconsin-Stout, the plaintiff might suffer physical injury and emotional distress causing a disabling emotional

response to the defendants' conduct, resulting in the plaintiffs, inability to function in other relationships.

28. The defendants had a duty to plaintiff to administrate plaintiff's graduate degree program without the occurrence of negligent actions on the part of the defendants.

29. The defendants knew of should have known that the *administration of* plaintiff Is graduate degree program by requiring the disclosure of plaintiff's manic depressive *condition to* plaintiff's practicum site supervisor was a breach of defendants, duty to plaintiff.

30. That as a result of the defendants' conduct in denying plaintiff the opportunity to complete her graduate school program at the University of Wisconsin-Stout, the plaintiff did suffer physical injury and emotional distress causing a disabling emotional response to defendants' conduct, resulting in the plaintiffs, inability to function in other relationships, which was a direct and proximate result of the defendants conduct herein.

WHEREFORE, the plaintiff demands judgment against the defendants for compensatory and punitive damages in an amount to be determined, reasonable attorneys fee, and the costs and disbursements of this action, as well as such other relief as the court deems appropriate.

Dated this 27th day of June, 1997.

/s/ John E. Joyce
JOHN E. JOYCE, SB# 01008608
Attorney for the Plaintiff

(2)

Supreme Court, U.S.
FILED
JUN 22 2001
CLERK

No. 00-1745

In The

Supreme Court of the United States

ARLENE COOPER and CALVIN STOUDT,

Petitioners,

v.

CONNIE G. POWELL,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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JURISDICTION

Petitioners contend the decision of the Wisconsin Supreme Court found a constitutionally protected property right in continuing a post-secondary education and denied the petitioners qualified immunity defense. (Petition p. 2) However, under Wisconsin law, the equally divided decision of the Wisconsin Supreme Court has no value or affect as precedent, other than to automatically affirm the decision of the Wisconsin Court of Appeals. *Ives v. Cooperstool, Div. of Casper Industry*, 208 Wis. 2d 55, 559 N.W. 2d 571, 573 (1997); *State ex rel. Thompson v. Jacobson*, 199 Wis.2d 714, 719, 546 N.W. 2d 140 (1996); *State v. Elam*, 195 Wis.2d 683, 685, 538 N.W. 2d 249, 250 (1995).

Rule 10 of the Supreme Court Rules sets forth the jurisdictional rules applicable to this petition. There is no decision of a United States Court of Appeals under Rule 10(a), or decision of a state court of last resort in conflict with another state court of last resort or United States Court of Appeals under Rule 10(b). The Supreme Court has jurisdiction to review the Wisconsin Supreme Court decision in this case only if there has been the "decision" of an important question of federal law that has not been, but should be, settled by this Court, or a "decision" of an important federal question in a way that conflicts with relevant decisions of this Court, under Rule 10(c). The petition for review herein requests a writ of certiorari to review the "decision" of a divided Wisconsin Supreme Court, which under the Wisconsin law cited above, has no precedent value or affect other than to automatically affirm the Wisconsin Court of Appeals. Without a "decision" to review, in the sense of a decision with precedent

value, there can be no review by writ of certiorari under Rule 10(c).

STATEMENT OF THE CASE

Petitioners contend that Powell brought suit against them alleging that her right to due process under the Fourteenth Amendment was violated by the requirement that she disclose her manic depressive condition to the practicum supervisor as a prerequisite of participating in the practicum. (Petition p. 3) Powell alleged that her right to due process under the Fourteenth Amendment was violated by the lack of any hearing to determine whether it was necessary for her to disclose her manic depressive condition to her practicum supervisor as a prerequisite of participating in the practicum. (App. 59a, ¶ 18)

Petitioners contend the Wisconsin Court of Appeals and the Wisconsin Supreme Court upheld the decision of the circuit court in denying Petitioners motion to dismiss the case on qualified immunity grounds (Petition p. 4). The Wisconsin Court of Appeals upheld the decision of the circuit court, and the Wisconsin Supreme Court automatically affirmed the Wisconsin Court of Appeals on the basis of a tie vote. (5a, ¶ 12).

REASONS FOR DENYING THE WRIT

This is not an appropriate case for review of the issues raised by Petitioners. Petitioners contend the decision of the Wisconsin Supreme Court recognized a constitutionally protected property interest that has never been established by this Court, and makes available a substantive due process standard of review that has not been mandated in prior cases. The decision of the Wisconsin Supreme Court, which Petitioners ask this Court to review, was decided by a divided court and as a result has no precedent value or effect on these issues under Wisconsin law, other than to automatically affirm the decision of the Wisconsin Court of Appeals. (App. 5a, ¶ 12) *Ives v. Cooperstool, Div. of Casper Industry*, 208 Wis. 2d 55, 559 N.W. 2d 571, 573 (1997); *State ex rel. Thompson v. Jacobson*, 199 Wis. 714, 719, 546 N.W. 2d 140 (1996); *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W. 2d 249, 250 (1995). Consequently, a tie vote in the Wisconsin Supreme Court could not recognize a constitutionally protected property interest or make available a substantive due process standard of review.

Further, this matter is before this Court on an interlocutory appeal, which is not res judicata in any subsequent matters on the issues of the existence of a constitutionally protected property interest or the availability of substantive due process under facts similar to this matter. In *U.S. v. Hatter*, No. 991978, 05/21/01, (this Court noted an affirmance by an equally divided court is conclusive and binding upon the parties as respects the controversy, citing, *United States v. Pink*, 315 U.S. 203, 216 (1942); in *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1909) (this Court held that while the affirmance of a judgment

by this court by a divided court is a conclusive adjudications between the parties, it is not authority on the principles of law involved for the determination of other cases in this or in inferior courts); in *Durant v. Essex Company*, 74 U.S. (7 Wall) 107, 113 (1868) (this Court stated, "The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges on the question of law or fact involved . . . .serves to explain the absence of any opinion on the cause, and prevents the decision from becoming an authority for other causes of like character"). As noted in *Neil v. Biggers*, 409 U.S. 188, 190-192 (1972) (a tie voted is not an actual adjudication and does not establish precedent binding on this Court).

Consequently, as the Wisconsin Supreme Court was equally divided on the issues of the existence of a constitutionally protected property interest or the availability of substantive due process this Court's decision on those issues would have no effect on future cases by res judicata.

ARGUMENT

I. A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN CONTINUING A POST-SECONDARY EDUCATION HAS LONG BEEN RECOGNIZED UNDER WISCONSIN AND FEDERAL LAW.

A. The Wisconsin Supreme Court's decision did not establish any principles of law.

Petitioners contend that the Wisconsin Supreme Court's decision established a constitutional right not previously recognized by this Court. As previously noted, under Wisconsin law, the Wisconsin Supreme Court's decision, by an equally divided court, had no precedent value whatsoever. *Ives v. Cooperstool, Div. of Casper Industry*, 208 Wis. 2d 55, ___, 559 N.W. 2d 571, 573 (1997). The Wisconsin Supreme Court has previously held that, under general principles of appellate practice, a majority of participating justices must have agreed on a particular point for it to become considered the opinion of the court. *State ex rel. Thompson v. Jacobson*, 199 Wis. 2d 714, 719, 546 N.W. 2d 140 (1996); *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W. 2d 249, 250 (1995). Consequently, the Wisconsin Supreme Court's decision in this case, by a divided court, while final, does not establish any constitutional rights, but merely affirms the decision of the Wisconsin Court of Appeals. (App. 9a-28a)

B. The ruling of the Wisconsin Supreme Court was not contrary to decisions of this Court.

Further, Petitioners contend that the finding of a clearly established constitutional right to continue a post-graduate education by the Wisconsin Supreme Court

appears contrary to this Court's decision in *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 34, 35 (1973) (where it was held that education was not a right recognized by this Court as guaranteed by the Constitution); and *Goss v. Lopez*, 419 U.S. 565, 574 (1974) (where it was held that although Ohio was not constitutionally obligated to establish and maintain a public school system, once it did so its students had constitutional rights to due process under the Fourteenth Amendment).

However, *Goss v. Lopez* also holds that protected interests in property are normally created and defined by a source independent of the Constitution, such as state statutes or rules, which entitle citizens to certain benefits, citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Goss v. Lopez*, 419 U.S. at 572-73. Lower courts have held that when a state adopts legislation that directs its state colleges shall be open to all residents of the state upon the payment of a reasonable tuition, the state creates a claim of entitlement to an education in its state college system which warrants due process protection. *Harris v. Blake*, 799 F. 2d 419, 422 (10th Cir. 1986). Wisconsin has created such an entitlement in Wis. Stats. §§ 36.01 and 36.27, wherein the Wisconsin Legislature declares it in the public interest to provide a system of higher education which enables students of all ages, backgrounds and levels of income to participate in the search for knowledge and individual development upon the payment of tuition established by the board of regents.[1]

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[1] Wis. Stats. § 36.01,"The legislature finds it in the public interest to provide a system of higher education which enables students of all ages, backgrounds and levels of income to

C. Reliance on *Frank v. Marquette University.*

Petitioners contend the Wisconsin Court of Appeals' reliance on *Frank v. Marquette University*, 209 Wis. 372, 377, 245 N.W. 125 (1932) and *Martin v. Helstad*, 578 F. Supp. 1473, 1480 (W.D. Wis. 1983), in finding that a property right in a continuing post-secondary education existed, is misplaced. Petitioners contend that *Frank* does not stand for the proposition that a student has a constitutionally protected interest in continuing in a program of graduate study, as Frank sued a private university based on a contract theory, which did not involve a state action with Fourteenth Amendment or other constitutional issues. The Wisconsin Court of Appeals noted the Wisconsin Supreme Court in *Frank*, while not specifically referring to a property interest in the continuance of a college education, did find the court held the claim to be one "to compel the defendant university specifically to perform its contract with [Frank]" *Id.* at 377, 245 N.W. at 126, as a result of which the court found Frank had the right to continue in a course of study, a right protected from arbitrary and capricious state action. (App. 16a) In other words, regardless of whether *Frank* involved a state action or suit against a private university, the Wisconsin Supreme Court addressed the issue of a student's right to

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participate in the search for knowledge and individual development which stresses undergraduate teaching as its main priority; which offers selected professional graduate and research programs with emphasis on state and national needs . . . "

Wis. Stats. § 36.27(1)(a), "The board may establish for different classes of students differing tuition and fees incidental to enrollment in educational programs or use of facilities in the system.

continue in a course of study without the arbitrary or capricious interference with such right.

Petitioners also contend that *Frank* relies on *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909), which this Court characterized in *University of Michigan v. Ewing*, 474 U.S. 214 (1985) as "an antiquated race discrimination decision . . . whose holding has since been overtaken by events." While *Frank* cites *Booker*, it also cites such other cases such as *People ex rel. Cecil v. Bellevue Hospital Medical College*, 60 Hun. 107, 14 N.Y.S. 490 (1891) (when a student matriculates, it is a contract between the college and student that if he complies with the terms of the college, he is entitled to graduate); *Valentine v. Independent School District*, 187 Iowa 555, 174 N.W. 334, 6 A.L.R. 1525 (1919); (student was entitled to mandamus to obtain diploma when school acted in an arbitrary manner in refusing to issue diploma because student would not wear cap and gown). *Hamlett v. Reid*, 165 Ky. 613, 177 S.W. 440 (the law will not permit the purpose for which the school was created to be thwarted by the arbitrary action on the part of a member of the board); *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 116 N.W. 294 (1908), (when a student has fulfilled all demands of the institution and passed all examinations so as to be entitled to a diploma, and the directors arbitrarily and capriciously refuse to graduate the student, it is the duty of the court to issue a writ of mandamus to compel issuance of the diploma) *Frank* at 127. Therefore, to characterize *Frank* as relying on an "antiquated race discrimination decision", overstates the importance of *Booker* in the *Frank* case. *Frank* stands for

the proposition that a student has a constitutionally protected property interest in continuing a graduate school education that a college, state or private, cannot interfere with in an arbitrary or capricious manner.

D. Reliance on *Martin v. Helstad.*

Petitioners further contend that *Martin* states, with little elaboration, that there is a property right in continuing in law school. *Martin* is not law school specific, in that it clearly states, "Courts and state law recognize a property interest in continuing education once a student has begun the course of study. In support of this proposition, *Martin* does elaborate by citing *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 79, 98 S.Ct. 948, 55 L. Ed. 2d 124 (1978); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L. Ed. 2d 725 (1975); *Betts v. Board of Education*, 456 F.2d 629 (7th Cir. 1972). The *Martin* court further elaborates by citing Wis. Stats. § 36.05(11) (1981-82) for the proposition that "a 'student' is a person who is registered for study in an academic institution." In affirming the district court's initial decision in *Martin*, the Seventh Circuit Court of Appeals cited, Wis. Stats. § 36.05(11) (1979) which defines a student as a person who is registered for study.[2] For that reason, on the basis of *Goss v. Lopez*, *Martin* provides, "on the basis of state law appellees plainly had legitimate claims of entitlement to a public education. Further, all the cited cases and cases

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[2] Wis. Stats. § 36.05(11), "Student means any person who is registered for study in any institution for the current academic period."

uncovered in our research that discuss a student's property interest in his or her education acknowledge a property interest only in continuing the education." *Martin v. Helstad*, 699 F.2d at 399, n. 3. The language of *Martin* goes beyond the assumption of a property right, as Petitioners contend, to a property right based on case law and Wisconsin statute.

E. Reliance on *Horowitz* and *Ewing*.

Petitioners contend the Wisconsin Supreme Court failed to "fully" develop its analytical basis for concluding that a property interest existed, but that its decision in this case appears to rely heavily on the *Horowitz* and *Ewing* cases that such a right exists. A review of the Wisconsin Supreme Court's decision indicates that no reasoning was given for the existence of a property right as no such conclusion was reached by a majority of the court. Also there is no mention of either the *Horowitz* or *Ewing* cases when the tie vote on the existence of a property interest is discussed. (App. 51, ¶ 12) Consequently, Petitioners misstate the Wisconsin Supreme Court's analysis and its reliance on *Horowitz* and *Ewing*.

F. Case law in the lower courts.

Petitioners contend that the lack of a ruling from this Court on the constitutional issue of the existence of a property interest in continuing a post-secondary education has spawned extensive litigation of academic decisions and caused confusion in the lower courts, as illustrated by the case at bar. Petitioners go on to give

their opinion that lower courts have generally avoided the issue or assumed the right exists, often based on the parties' willingness to concede the existence of a constitutionally protected property interest under state law as in *Ewing*, 474 U.S. at 224; or for the sake of argument, as in *Horowitz*, 435 U.S. at 92. Petitioners' contentions that this Court's decisions in *Horowitz* and *Ewing*, lack rulings on the existence of a property interest and have caused confusion and litigation in the lower courts, leading to avoidance or assumption of the issue, is not supported by the case law in the lower courts. A review of the case law in the lower courts, as cited by Petitioners in their brief, shows that most courts have found a constitutional property interest in the continuance of a college education, once begun.

Courts Finding a Property Interest:

> *Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd without opinion*, 727 F. 2d 1101 (3d Cir. 1984) ("since Stoller has a constitutionally protected interest in continuing his medical education, substantive due process requires that his medical education not be terminated for 'arbitrary' or 'capricious' reasons"); *Unger v. National Resident Matching Program*, 928 F. 2d 1392, 1397 (3d Cir. 1991) (attempt to state a claim arising out of a property interest which failed as a matter of law, not because such an interest did not exist as Petitioners contend, but because such an interest only applied to students currently enrolled and not the plaintiff); *Dixon v. Alabama State Bd. of Education*, 294 F. 2d 150, 157 (5th), *certiorari denied*, 368 U.S. 930, 83 S. Ct. 608, 7 L. Ed. 2d 183 (1961) (found a right

to remain at a public institution of higher learning in which plaintiffs were students in good standing); *Stevens v. Hunt*, 646 F. 2d 1186 (6th Cir. 1981) (a qualified property right to study and practice medicine had long been recognized in the state of Tennessee); *Martin v. Helstad*, 699 F.2d 387, 388-89 (7th Cir. 1983) (found it was clear that a student had a property interest under Wisconsin law as a result of Wis. Stats. § 36.05(11), defining a "student" as a person that is "registered for study", noting the court's research indicated a student only had a property interest in a continuing education (footnote 2); *Atkins v. Bd. of Gov. of State Colleges and Univ.*, 840 F. 2d 1371, 1376 (7th Cir.1988) (adopted finding of magistrate that complaint stated a cause of action for violation of substantive due process rights based on contractual relationship of college or university with its students amounting to a property right in their continued education, although law regarding whether student had a substantive due process right was not established clearly enough to survive qualified immunity); *Gaspar v. Bruton*, 513 F.2d 843 (10th Cir. 1975) (found that, in light of *Goss v. Lopez*, which recognized a property right in public school students, that such a right must be recognized to have vested in *Gaspar*, even more so in that she paid a specific and separate fee for enrollment and attendance.); *Harris v. Blake*, 798 F. 2d 419, 422 (10th Cir. 1986) (found that relying on *Goss v. Lopez*, the state of Colorado had created the basis for a claim of entitlement to an education in its state college system, where the legislature had directed that state colleges "shall be open . . . to all persons resident in this state" upon payment of a reasonable tuition fee –

therefore Harris had a property interest in his enrollment which entitled him to due process.[3]); *Hall v. University of Minnesota*, 530 F. 2d 104, 107 (1982) (held a student's right in attending a university was a property right protected by due process); *Martin v. Helstad*, 578 F. Supp. 1473, 1480 (1983) (found that both courts and state law recognized a property right in a continuing education once a student had begun a course of study – citing Wis. Stats. § 36.05(11) defining a "student" as a person registered for study in an academic institution); *Anderson v. University of Wisconsin*, 665 F. Supp. 1372, 1396 (W.D. Wis. 1987) (court stated it would not argue with student's contention that a property interest in a continuing education existed once student had begun course of study); *Siblerud v. Colorado State Bd. of Agriculture*, 896 F. Supp. 1506, 1512 (D. Colo. 1995) (found property interest created by state law in the form of under Colorado statute opening state colleges to all who paid tuition, as plaintiff paid a specific fee for attendance); *Frank v. Marquette University*, 209 Wis. 372, 377, 245 N.W. 125, 127 (1932) (held law is well settled that a university, college or school may not arbitrarily or capriciously dismiss a student or deny him the right to continue his course of study); *Abbariao v. Hamline University Law School*, 258 N.W. 2d 108, 112 (Minn. 1977) (held that cases involving public universities demonstrate that student's interest in attending a university is a property right protected by due process); *Evans v. West Virginia Bd. of Regents*, 165 W. Va. 780, 781, 271 S.E. 2d 778,

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[3] See footnote 1, p. 6

780 (1980) (held student had a sufficient property interest in the continuation and completion of his medical education to warrant minimal due process protections). The overwhelming majority of cases cited by Petitioners contain findings by the courts involved that a property interest in a continuing college education protected by the constitution does exist.

Courts Assuming a Property Right Exists:

In several cases, the courts have assumed that a property interest exists in the continuation of a college education, usually where the courts find that sufficient due process was provided to the student regardless of the existence of either a property or a liberty interest. *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (found the student had been accorded sufficient due process even though Court assumed student had a constitutionally protected liberty or property interest existed); *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (held student received sufficient due process even assuming he had a property interest in continuing his graduate education); *Hamil v. Vertrees*, 2001 WL 135716, p. 6 (M.D. Ala. Jan. 10, 2001). (All cases found by the court assume, without deciding, that a "student who is subject to academic dismissal may maintain a cause of action for the violation of his right to substantive due process."); *Nickerson v. Univ. of Alaska Anchorage*, 975 F. 2d 46, 52 (Alaska 1999) ("while we have not identified the interest implicated, we have noted that 'a school must provide minimal process before suspending or dismissing a student for disciplinary reasons"); *Shuler v. University of Minnesota*, 788 F.2d 510, 513, 514, n. 6 (8th Cir.

1986) (court assumed a property interest, finding student was accorded at least as much due process as Fourteenth Amendment required.); *Richmond v. Fowlkes*, 228 F. 3d 854, 857 (8th Cir. 2000) ("Assuming, without deciding, the existence of a property or liberty right, we conclude that Richmond received all the process that he was due.") *Haberle v. University of Alabama in Birmingham*, 803 F. 2d 1536, 1539, n. 1 (11th Cir. 1986) (court would assume the existence of a property interest, without deciding the issue as due process was found to be adequate); *Hammond v. Auburn Univ.*, 669 F. Supp. 1555, 1561 (M.D.Ala. 1982), *aff'd mem.*, 858 F. 2d 744 (11th Cir. 1988) ("Court assumed a constitutionally protected property right exists in post-secondary education.")

Courts Not Finding Property Interest:

Soong v. University of Hawaii at Hilo, 72 Haw. 586, 590, 825 P.2d 1060, 1062 (Haw. 1992) (plaintiff contended she had a constitutionally protected substantive due process right in continued enrollment at the university, but did not show such a right was clearly established).

Unpublished Cases:

Petitioners cite two cases that are unpublished, *Reidinger v. Board of Regents of University of Wisconsin*, 2001 WI App. 31, ¶ 6, 622 N.W. 2d 770 (Ct. App. 2000) and *Shudooh v. University of Wisconsin-Madison, et al.*, (Case No. 00-C-0267-C) (W.D. Wis. April 4, 2001.) (Slip op. at p. 14). Unpublished opinions are not precedent. *U.S. v. Ables*, 167 F. 3d 1021 (6th Cir. 1999) certiorari denied, 527 U.S. 1027. Further, unpublished cases may not be cited or used as precedent in

the Seventh Circuit. *Circuit Rule 52, Seventh Circuit.*

The above enumerations make it clear that the overwhelming majority of courts have found a constitutionally protected property interest in a continuing post-secondary education, once the course of study has begun. A minority of courts have assumed a property interest when they have also found sufficient due process was provided. A very few courts have not found or assumed a constitutionally protected property interest. While the existence of such a property interest may be an open question in the Seventh Circuit, the existence of such a property interest is clearly not an open question in many of the other federal circuits.

Far from the confusion Petitioners contend, it would appear that most courts have no problem with the concept that a constitutionally protected property interest exists in the continuation of a college or graduate education, once the course of study is begun; and that such a property interest can be assumed if there is a finding that sufficient due process was provided the student to satisfy the requirements of the Fourteenth Amendment. To contend, as Petitioners contend, that the question of whether there is a constitutionally protected property interest in continuing a graduate program remains unsettled and treated in widely varying ways by the lower courts is to seek confusion where none would appear to exist merely to justify Petitioners' petition for certiorari in this case.

II. THE WISCONSIN SUPREME COURT DID NOT DISCUSS A SUBSTANTIVE DUE PROCESS RIGHT TO REVIEW AN ACADEMIC DECISION.

A. The Wisconsin Supreme Court did not discuss substantive due process.

Petitioners contend the Wisconsin Court of Appeals, relying on *Ewing*, found Powell had a substantive due process right in continuing her education, a finding the Wisconsin Supreme Court affirmed. (Petition p. 14) As previously noted, the Wisconsin Supreme Court was equally divided in its per curiam ruling of February 16, 2001, which did not result in a "holding" or "finding" on any issue, including substantive due process. (App. 5a)

Actually, the Wisconsin Court of Appeals relied on *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043 (1998), not *Ewing*, which holds, "the exercise of power without any reasonable justification in the service of a legitimate governmental objective" is the touchstone of a substantive due process claim. (App. 21a) After discussing Powell's liberty interests, which was later held waived by the Wisconsin Supreme Court for failure to plead (App. 2a, ¶ 3, 6a, ¶ 14), the Wisconsin Court of Appeals noted that the property right Powell asserted in her continuing course of study would be subject to the "shocks the conscience" standard in a substantive due process challenge as well as the standard of deliberate indifference. *County of Sacramento*, 118 S.Ct. at 1718. (App. 22a)

It may well be, under the facts of this case, that Powell could show the conduct of the Petitioners to be such that it would shock the conscience in ending her

graduate program without any due process whatsoever, exhibiting a deliberate indifference to Powell's rights to have some determination that her manic-depression would actually have a detrimental effect on her practicum. The use of a generic definition of manic-depression by Petitioners throughout their briefs exhibits a shocking disregard and indifference to the manic-depression suffered by so many, as two psychology professors such as Petitioners should have been aware.

B. Petitioners' decision was disciplinary, not academic.

Petitioners frequently contend in their briefs that their decision in demanding Powell disclose her manic-depression condition to her practicum site supervisor was an academic and not a disciplinary decision. The reason for this contention is obvious, as courts have traditionally and frequently given deference to the academic decisions of academic institutions and their faculty, as can be noted from the decisions on failing grades, course and curriculum requirements and clinical placement cited by Petitioners in their brief in support of certiorari. (Petition p. 16-18) In other words, academic personnel attempt to cloak their decisions as academic decisions to escape close scrutiny by the courts, which usually required more due process for disciplinary than academic decisions.

To substantiate their contention that their decision was academic, Petitioners cite a number of cases involving failing grades in a graduate school setting. (Petition p. 16) However, Powell enjoyed a 3.887 cumulative grade-point average on a 4.0 grade-point system, with no failing

grades in any aspect of her graduate program. (Petition p. 3)

In the same effort, Petitioners cite a number of cases concerning the failure of graduate students to meet course and curriculum requirements (Petition pp. 16-17). However, Powell was a graduate student in good standing at the time she was ordered to disclose her manic-depression condition in January of 1991, with no prior problems with remedial plans, oral examinations, retaking examinations, examinations prior to dissertations, or excessive absenteeism. (Petition p. 3)

Finally, petitioners cite a number of cases involving the problems of graduate or professional students with clinical placement. (Petition pp. 17-18) However, Powell was never granted the opportunity to participate in a clinical placement and therefore had no opportunity to display any problems based on lack of skills, performance problems, interpersonal problems in her practicum, or suggested removal by agencies involved in her practicum.

Powell's academic preparation for a graduate degree was complete except for her practicum and thesis. Petitioners' directive to disclose was not an academic decision, but a faculty directive, which resulted in Powell's expulsion from her graduate program when she refused to obey the directive. Not allowing Powell's graduation was plainly disciplinary. Powell was given a directive which she refused to obey and was punished for her refusal.

Petitioners contend that unresolved constitutional issues in *Horowitz* and *Ewing* have led to 20 years of

assuming such rights as Powell claims exist, and assuming courts are in a better position than professional educators to make academic decisions. (Petition p. 19) However, this is not an academic decision. Petitioner further contends that, as a result, Courts have expanded substantive due process to areas beyond which it has been traditionally limited. *Albright v. Oliver*, 510 U.S. 266, 271-272 (1994). It now includes the right to second-guess grades, the format of examinations, clinical skills, policies on test contents, and performance evaluations. (Petition p. 19) However, as noted above, none of these academic considerations apply to this matter.

Petitioners contend that nationwide, students will now attempt to use this case as precedent to claim constitutional protections in a variety of academic decisions, such as grades, examinations, curriculum requirements, clinical programs, extra-curricular programs and student evaluation. (Petition p. 19) However, in that the ruling of the Wisconsin Supreme Court was equally divided and had no precedent value, as well as constituting an interlocutory ruling without res judicata effect, this contention is without merit.

III. THE DIVIDED OPINION OF THE WISCONSIN SUPREME COURT IS NO HOLDING, DIRECTLY OR INDIRECTLY, REGARDING THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT IN CONTINUING A HIGHER EDUCATION PROGRAM, BUT SUCH RIGHT WAS CLEARLY ESTABLSIHED BY A CONSENSUS OF THE CASE LAW IN JANUARY OF 1991, WHEN PETITIONERS ACTED.

A. The divided decision of the Wisconsin Supreme Court resulted in no holding in regard to the existence of a constitutionally protected property right in Powell's continuation of her program of graduate school education.

Petitioners contend the Wisconsin Supreme Court was incorrect in holding, indirectly, that a constitutionally protected right for Powell to continuing her higher education program was clearly established in 1991. (Petition p. 20) As previously noted, the Wisconsin Supreme Court could not hold there was a constitutionally protected right in Powell continuing in a higher education program, as the court was equally divided on this issue. Three justices voted to affirm the court of appeals' conclusion that such a property right existed at the time in question, was clearly established, and defendants were not entitled to qualified immunity; while three other justices concluded that even though such a property right existed at the time, it was not well enough established and the defendants were entitled to qualified immunity. (App. 5a) Consequently, there was no holding of a clearly established property right in 1991 either directly or indirectly.

B. There was a sufficient consensus of the case law in January of 1991 that Powell's property rights in continuing her education were clearly established, and the actions of Cooper and Stoudt were unlawful.

The only issue in this matter, relevant to qualified immunity, is whether Powell had a constitutionally protected property interest in continuing her graduate school education which was established by a clear consensus of case law in January of 1991, when Cooper and Stoudt acted in the manner challenged by this action. That Powell received no due process is clear from the facts in this matter, as there is no appearance of any hearing held to determine if Powell needed to disclose her manic-depression condition to her practicum site supervisor, nor even an investigation of any kind to determine that such disclosure was necessary in Powell's case.

To prove the presence of a clearly established constitutional right, the plaintiff must point to "closely analogous cases" decided prior to the defendants' challenged actions. *Rakovich v. Wade*, 850 F.2d 1180, 1205 (7th Cir.), *certiorari denied*, 488 U.S. 968, 109 S.Ct. 47, 102 L.Ed. 2d 534 (1988). Adjusting the enumeration of cases set forth in part I of this argument for cases decided before actions of Cooper and Stoudt in January of 1991, the state of the law at that time appears as follows:

Courts Finding a Property Interest Prior to Petitioners' Actions

> *Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa 1983), *aff'd without opinion*, 727 F. 2d 1101 (3d Cir. 1984) ("since Stoller has a constitutionally protected interest in continuing his medical education, substantive due process

requires that his medical education not be terminated for 'arbitrary' or 'capricious' reasons"); *Dixon v. Alabama State Bd. of Education*, 294 F. 2d 150, 157 (5th), *certiorari denied*, 368 U.S. 930, 83 S. Ct. 608, 7 L. Ed. 2d 183 (1961) (found a right to remain at a public institution of higher learning in which plaintiffs were students in good standing); *Stevens v. Hunt*, 646 F. 2d 1186 (6th Cir. 1981) (a qualified property right to study and practice medicine had long been recognized in the state of Tennessee); *Martin v. Helstad*, 699 F.2d 387, 388-89 (7th Cir. 1983) (found it was clear that a student had a property interest under Wisconsin law as a result of Wis. Stats. § 36.05(11), defining a "student" as a person that is "registered for study", noting the court's research indicated a student only had a property interest in a continuing education); *Gaspar v. Bruton*, 513 F.2d 843 (10th Cir. 1975) (found that, in light of *Goss v. Lopez*, which recognized a property right in public school students, that such a right must be recognized to have vested in *Gaspar*, even more so in that she paid a specific and separate fee for enrollment and attendance.); *Harris v. Blake*, 798 F. 2d 419-422 (10th Cir. 1986) (found that relying on *Goss v. Lopez*), the state of Colorado had created the basis for a claim of entitlement to an education in its state college system, where the legislature had directed that state colleges "shall be open . . . to all persons resident in this state" upon payment of a reasonable tuition fee (citations) – therefore Harris had a property interest in his enrollment which entitled him to due process.[4]); *Hall v.*

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[4] See footnote 1, p. 6. At the time Powell was ordered to disclose her condition, she had paid her tuition and was student in good standing. (Petition p. 3)

University of Minnesota, 530 F. 2d 104, 107 (1982) (held a student's right in attending a university was a property right protected by due process); *Martin v. Helstad*, 578 F. Supp. 1473, 1480 (1983) (found that both courts and state law recognized a property right in a continuing education once a student had begun a course of study – citing Wis. Stats. § 36.05(11) defining a "student" as a person registered for study in an academic institution); *Anderson v. University of Wisconsin*, 665 F. Supp. 1372, 1396 (W.D. Wis. 1987) (court stated it would not argue with student's contention that a property interest in a continuing education existed once student had begun course of study); *Frank v. Marquette University*, 209 Wis. 372, 377, 245 N.W. 125, 127 (1932) (held law is well settled that a university, college or school may not arbitrarily or capriciously dismiss a student or deny him the right to continue his course of study); *Abbariao v. Hamline University Law School*, 258 N.W. 2d 108, 112 (Minn. 1977) (held that cases involving public universities demonstrates that student's interest in attending a university is a property right protected by due process); *Evans v. West Virginia Bd. of Regents*, 165 W. Va. 780, 781, 271 S.E. 2d 778, 780 (1980) (held student had a sufficient property interest in the continuation and completion of his medical education to warrant minimal due process protections).

All of the cases cited above, with the exception of *Frank v. Marquette University*, from the federal circuit courts of appeal, federal district courts and Wisconsin Supreme Court clearly hold that the student had a constitutionally protected property right in continuing the student's college or graduate education. *Frank* discusses

substantive due process and the arbitrary loss of enrollment. Consequently, there is a clear consensus in the case law prior to the actions of Cooper and Stoudt, which are challenged in this action.

Courts Assuming a Property Interest Existed Prior to Petitioners' Actions

The only cases that do not clearly hold a constitutionally protected property right or prohibit arbitrary loss of enrollment in violation of substantive due process, are those cases which assume the existence of a property right. All of these cases clearly treat circumstances in which sufficient due process was found to have been provided the student, making the existence of a constitutionally protected property right irrelevant.

In several cases, the courts have assumed that a property interest exists in the continuation of a college education, usually where the courts find the sufficient due process was provided to the student regardless of the existence of either a property or a liberty interest. *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (found the student had been accorded sufficient due process even though Court assumed student had a constitutionally protected liberty or property interest existed); *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (held student received sufficient due process even assuming he had a property interest in continuing his graduate education); *Shuler v. University of Minnesota*, 788 F.2d 510, 513, 514, n. 6 (8th Cir. 1986) (court assumed a property interest, finding student was accorded at least as much due process as Fourteenth Amendment required.); *Haberle v. University of*

Alabama in Birmingham, 803 F. 2d 1536, 1539, n. 1 (11th Cir. 1986) (court would assume the existence of a property interest, without deciding the issue as due process was found to be adequate); *Hammond v. Auburn Univ.*, 669 F. Supp. 1555, 1561 (M.D.Ala. 1982) *aff'd mem.* 858 F. 2d 744 (11th Cir. 1988) ("Court assumed a constitutionally protected property right exists in post-secondary education.")

Courts Finding No Property Interest Prior to Petitioners' Actions

Petitioners cite no cases decided prior to January, 1991, which hold that a constitutionally protected property interest in continuing a college education does not exist. Petitioners cite *Osteen v. Henley*, 13 F.2d 221, 236 (7th Cir. 1993); *Atkins v. Bd. of Gov. of State Colleges and Univ.*, 840 F.2d 1371, 1376 (7th Cir. 1988); and *Unger v. National Residents Matching Program*, 928 F.2d 1391, 1397 (3rd Cir. 1991). *Osteen* and *Unger* were decided after the actions of the Petitioners in this case, and therefore they could not have been aware of the uncertainty created by these cases at the time of their actions. *Atkins* is the only case Petitioners cite, which was decided before their actions were filed, and which states the existence of a property interest in continued enrollment is unclear, as compared to the array of cases cited above which find or assume the existence of such property right.

The Seventh Circuit Court of Appeals, in *Upton v. Thompson*, 930 F. 2d 1209, 1212 (7th Cir. 1991), set forth the law of qualified immunity at the time of the actions of Cooper and Stoudt in ordering Powell's disclosure in January of 1991. This case holds that the right the official is alleged to have violated must have been "clearly

established" in a "particularized way" and "the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right." *Anderson v. Creighton*, 481 U.S. 635, 640, 197 S.Ct. 3034, 3039, 97 L.Ed. 2d 523 (1987). In this case, the right of Powell to procedural due process as a result of her property interest in continued enrollment was clearly established in a particularized way, making the contours of the right sufficiently clear so that Petitioners would understand that by preventing Powell from continuing her education, they violated her right.

Further, whether an official may prevail in his qualified immunity defense depend upon the 'objective reasonableness' of his conduct as measured by referring to clearly established law. *Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017, 82 L.Ed.2d 139 (1984). The objective reasonableness of the Petitioners' conduct, when measured against the cases cited above finding the right of continued enrollment, is clearly lacking. It is clear, from the law established prior to Petitioners' actions, that a property interest in continued enrollment existed in not just one but at least ten cases in a variety of federal and state courts. It was patently unreasonable for Petitioners to prevent Powell from continuing her education without at least some minimal due process in light of this repeated precedent that a right giving rise to due process existed.

The principle behind the doctrine is that "[I]f the law at the time was not clearly established, an official could not reasonably be

expected to anticipate subsequent legal developments nor could he fairly be said to know that the law forbade conduct not previously identified as unlawful." *Greenberg v. Kmetko*, 849 F. 2d 467, 472 (7th Cir. 1988); *Cygnar v. City of Chicago*, 865 F.2d 827, 843 (7th Cir. 1989). Based on the ten or so cases listed above, finding a property interest in continued enrollment existed, requiring some due process, the Petitioners could reasonably be expected to know the law forbade their conduct in preventing Powell from completing her practicum and her graduate education.

What is important, in the final analysis, is "whether the legal norms governing [the government official's] behavior were clearly established at the time of the challenged actions." *Wrigley v. Greanias*, 842 F.2d 956, 958 (7th Cir. 1988). The legal norms governing the Petitioners' behavior was clearly established at the time of their actions. This is not a matter of multiple cases on both sides of the issue, but the case of multiple cases finding a property interest in continued enrollment, and some case assuming such a right, with a few cases stating the question is unsettled. While Petitioners would like to contend these latter cases may have been confusing (Petition p. 20), the overwhelming authority finding the property interest makes such contention less than credible.

Further, Petitioners contend that "a split among courts regarding the constitutionality of conduct analogous to the conduct in question is an indication that the right was not clearly established at the time of the alleged violation", citing *Dennis v. Dunlap*, 209 F.3d 944, 950 (7th

Cir. 2000). (Petition p. 20) Not only was this case decided after the Petitioners' actions occurred, making it difficult for Petitioners to know about the proposition that a split in authority indicates that a right was not clearly established, but there is no real split in authority prior to their actions. There are some ten cases finding a property interest in continued enrollment, four or five cases assuming such a property interest, one case stating the existence of the property interest is unclear. This is not such a split in authority that would make Powell's property interest and right to due process less than clearly established.

Finally, Petitioners contend they should not be held to an understanding of constitutional law that the Wisconsin Supreme Court cannot agree upon. The Wisconsin Supreme Court's equal split of opinion in this case is only one case, when qualified immunity for Petitioners must be based upon a consensus of cases that show the law to be unclear on the issues of the existence of a property interest in continued enrollment and resultant due process rights. (Petition p. 22) It is the consensus that is pivotal in this matter, not the disagreement of the Wisconsin Supreme Court.

The consensus of precedent existing in 1991 was clear and overwhelming to establish the existence of a constitutionally protected property right giving rise to due process rights for Powell. Petitioners should have known of this right.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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No. 00-1745

In The

Supreme Court of the United States

ARLENE M. COOPER and CALVIN STOUDT,

Petitioners,

v.

CONNIE G. POWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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No. 00-1745

In The

Supreme Court of the United States

ARLENE M. COOPER and CALVIN STOUDT,

Petitioners,

v.

CONNIE G. POWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

I. THE LOWER COURT DECISION IS APPROPIATE FOR REVIEW

Connie Powell argues this Court should deny the petition for *certiorari* because the decision below was evenly divided and has no precedential value. To the contrary, the lower court decision is binding on these petitioners. An

evenly split decision from an appellate court results in the underlying lower court decision having "full force" as a final order. *Durant v. Essex Co.*, 7 Wall. 107, 112 (1869), *quoted in Neil v. Biggers*, 409 U.S. 188, 192 (1972).

Moreover, neither an evenly divided lower court decision, nor the fact that the lower court decision lacks value as precedent, precludes the grant of *certiorari* by this Court. This Court has routinely granted *certiorari* to review evenly divided decisions of state supreme courts and federal courts of appeal. *See, e.g, Fox River Co. v. Railroad Commission of Wisconsin*, 274 U.S. 651, 654 (1927); *Taylor v. Mississippi*, 319 U.S. 583, 585(1943); *Supreme Court of New Hampshire. v. Piper*, 470 U.S. 274, 278 (1985).

Similarly, this Court has reviewed numerous unpublished lower court decisions, regardless of their value as precedent. As Justice Blackmun stated in *Smith v. U.S*, 502 U.S. 1017, 1020 n.1 (1991) (*dissenting on other grounds*), "the fact that the Court of Appeals' decision is unpublished is irrelevant" to the Court's decision to accept review. *See also, Commissioner v. McCoy*, 484 U.S. 3, 7 (1987); *Johnson v. U.S.*, 520 U.S. 461, 465 (1997); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20 (1993); *Schlesinger v. Reservists Committee To Stop The War*, 418 U.S. 208, 209 (1974).[1]

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[1] Contrary to Powell's contentions, nothing in Supreme Court Rule 10 precludes review. That rule lists considerations involved in the decision-making process for granting certiorari review and provides potential reasons for granting certiorari, but notes that these reasons are "neither controlling" nor fully exhaustive. Sup. Ct. Rule 10. The rule does not restrict this Court's ability to grant certiorari, a decision that Congress has placed firmly "within the Court's discretion." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950).

As these cases demonstrate, an evenly divided decision of the Wisconsin Supreme Court affirming an unpublished Wisconsin Court of Appeals opinion does not preclude the grant of *certiorari*.

Finally the lower court decision denied the petitioners' qualified immunity defense. Therefore it is a final judgment properly before this Court for review. *Behrens v. Pelletier*, 516 U.S. 299, 307-08 (1996); *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

II. STATE AND FEDERAL COURTS ARE DIVIDED AND CONFUSED ON WHETHER THERE IS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN CONTINUING A POST-SECONDARY EDUCATION.

This Court has never found that a student has a constitutionally protected property interest in continuing in a post-secondary education program. Both the federal and state courts are divided on the issue, and this division reinforces the need for the Court to grant this petition and clarify the law for students, educators and the lower courts.

More important, by the present petition satisfies the rule because "a state court . . has decided an important question of federal law that has not been, but should be, settled by this court." Sup. Ct. Rule 10(c). The petition also satisfies the rule because "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. Rule 10(b).

Powell asserts that "most courts have found a constitutional property interest in the continuance of a college education, once begun."*(sic)*, (Respondent's Brief in Opposition at p. 11) The cases Powell cites, however, do not agree on this proposition, but rather reflect the confusion in the law that requires the grant of *certiorari* here.

For example, the court in *Unger v. National Residents Matching Program*, 928 F. 2d 1392, 1399 (3d Cir. 1991) actually found that *no* property right existed. Other cited cases suggest the existence of a constitutionally protected right, but only in *dictum*. *Siblerud v. Colorado State Board of Agriculture*, 896 F. Supp. 1506, 1513 (D. Colo. 1995); *Stevens v. Hunt*, 646 F. 2d 1168, 1169-70 (6th Cir. 1981); *Anderson v. University of Wisconsin* , 665 F. Supp. 1372, 1396 (W.D. Wis. 1987), *aff'd* 841 F.2d 737 (7th Cir. 1988); *Martin v. Helstad*, 699 F. 2d 387, 390 (7th Cir. 1983); *Martin v. Helstad*, 578 F. Supp. 1473, 1480 (W.D. Wis. 1983). One case, *Akins v. Board of Governors of State Colleges and Universities*, 840 F.2d 1371, 1376 (7th Cir. 1988), *vacated on other grounds*, 488 U.S. 920 (1988), specifically holds the issue is still an open question.

The cases Powell cites that *do* recognize the existence of a property right uniformly exhibit a dearth of legal reasoning and precedent in support of their holdings, and have either been questioned by later cases in the jurisdiction or predate this Court's decisions in *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985) and *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978). *See: Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd per curiam, without decision*, 727 F.2d 1101 (3d Cir. 1984); *Abbariao v. Hamline University School of Law*, 258 N.W. 2d 108, 112 (Minn. 1977); *Evans v. West Virginia Board of Regents*, 165 W. Va. 780, 271 S.E.2d 778, 781-82 (W.Va. 1980); *Gaspar v.*

Bruton, 513 F. 2d 843, 850 (10th Cir. 1975); *Hall v. University of Minnesota*, 530 F. Supp. 104, 107-108 (D. Minn. 1982); *Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986). To the extent that these jurisdictions do recognize a constitutionally protected property interest in continuing in a post-secondary education program, they do not reflect the controlling view. Considered against the body of decisions in the area, they serve to highlight the overall confusion in the law on this issue.

Powell's arguments based on *Frank v. Marquette University*, 209 Wis. 372, 377, 245 N.W. 125, 127 (1932) similarly reflect the confusion about the nature of the property interest involved here. Powell contends that *Frank* "stands for the proposition that a student has a constitutionally protected property interest in continuing a graduate school education that a college, state or private, cannot interfere with in an arbitrary or capricious manner." (Respondent's Brief in Opposition, pp. 8-9). The Wisconsin Court of Appeals relied, in part, on *Frank* to find that Powell enjoyed a constitutionally protected property interest. (Appendix 16a-17a) Yet a review of the *Frank* decision demonstrates that both the Court of Appeals and Powell have misread it. It has no relevance here.

Frank was expelled from Marquette University, a *private* institution. He sued on a contract theory to get copies of records of disciplinary actions taken against ten students who graduated. The Due Process clause protects individuals against *government* action. *U.S. v. Salerno*, 481 U.S. 739, 746 (1987). Because *Frank* did not involve any government action, it does not have constitutional implications.

Powell's reliance on Ch. 36, Wis. Stats., to support the notion that there is a property interest in continuing a higher education, is similarly misplaced. (Respondent's

Brief in Opposition at pp. 6, 9, 10) Powell points to *Martin v. Helstad,* 699 F.2d at 399, n.3, and *Harris v. Blake*, 799 F.2d 419, 422 (10th Cir. 1986), to argue that the state law establishing the University of Wisconsin System creates a property interest in continuing in an education program.

Powell reads *Martin v. Helstad* too broadly. The two *Martin v. Helstad* opinions relied on the definition of "student" in Ch. 36 to reject the plaintiff's claim that he had a constitutional right to *admission* to an institution of higher education. The statements in these decisions concerning any property interest in *continuing* in a higher education program were *dicta. Martin v. Helstad,* 699 F.2d 387, 390 (7th Cir. 1983); *Martin v. Helstad,* 578 F.Supp.1473, 1480 (W.D. Wis. 1983). *Harris* is distinguished because it arose out of the 10th Circuit, and did not construe the Wisconsin statute. *Harris v. Blake,* 799 F.2d at 422. It does not establish that a property interest exists in Wisconsin. State law defines a property interest. *Bishop v. Wood,* 426 U.S. 341, 344 (1976) In any event, both the Seventh Circuit and the District Court have subsequently ruled that it is an open question whether a constitutionally protected property interest in continuing in a graduate school program exists. *Osteen v. Henley,* 13 F.3d 221, 226 (7th Cir. 1993); *Akins v. Board of Governors of State Colleges and Universities*, 840 F.2d at 1376, *vacated on other grounds* 488 U.S. 920 (1988); *Shudooh v. University of Wisconsin-Madison*, (Case No. 00-C-0267-C) (W.D. Wis., April 4, 2001) (Unpublished).

The Wisconsin courts' confusion over the existence of a constitutionally protected property interest under Wisconsin law, and the split of opinion among and within federal and state courts as to whether a constitutionally protected property right exists, demonstrate the need for this Court to accept this petition and settle the issue.

III. THE LOWER COURTS IMPROPERLY RECOGNIZED A SUBSTANTIVE DUE PROCESS RIGHT TO REVIEW OF ACADEMIC DECISIONS

This Court has never found a substantive due process right to review of academic decisions.[2] Rather, it has merely *assumed* the right exists for purposes of argument. *Ewing*, 474 U.S. at 223; *Horowitz*, 435 U.S. at 91-92. In finding such a right, the Wisconsin Court of Appeals did not respect the narrow scope of substantive due process review this Court has laid out. Substantive due process analysis is largely confined to "marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 271-272 (1994). The Wisconsin Court of Appeals failed to locate the claimed right as one "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist" without it. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Surely, requiring Powell to inform her guidance and counseling practicum supervisor of her manic-depressive disorder threatens none of our nation's history and traditions or the survival of liberty and justice.

The Wisconsin Court of Appeals misread *Ewing* and *Horowitz* in finding a substantive due process right to review

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[2] As Justice Powell noted in his concurring opinion in *Regents of University of Michigan v. Ewing*, the student's claim to a property right is "dubious at best". Powell wrote: "Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process . . . . The interest asserted by respondent - - an interest in continued enrollment . . . is essentially a state-law contract right. It bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution." *Ewing*, 474 U.S. at 229-30.

academic decisions. The Court of Appeals overrode faculty judgment without showing that the judgment was "such a substantial departure from accepted academic norms as to demonstrate that the person or committee did not actually exercise professional judgment". In doing so, it failed to "show great respect for the faculty's professional judgment". *Ewing*, 474 U.S. at 225; *Horowitz*, 435 U.S. at 96 n.6. (App. 23a)

The decisions of the Wisconsin Supreme Court and the Court of Appeals threaten the academic freedom of colleges and universities to make professional judgments regarding students and curriculum that they, not the courts, are uniquely qualified to make.[3]

IV. A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN CONTINUING A POST-SECONDARY EDUCATION WAS NOT CLEARLY ESTABLISHED IN 1991.

Given the inability of the Wisconsin Supreme Court to agree as to whether such a right existed in 1991, it goes without saying that such a right was not "clearly established" when the petitioners acted in 1991. Three years previously, in 1988, the U. S. Seventh Circuit had squarely held that "no case from this court establishes" a constitutionally protected property interest in continuing a post-secondary education. *Akins v. Board of Governors of State Colleges and Universities*, 840 F.2d at 1376, *vacated on other grounds*

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[3] Powell cites no case law, and petitioners are aware of none, to support her contention that the decision to require her to disclose her manic depressive condition was disciplinary and not academic. Powell's argument must be rejected as *ipse dixit*.

488 U.S. 920 (1988). The *Akins* court granted qualified immunity to the university defendants after surveying the law in the other lower federal courts and determining a university administrator would have concluded that no property right existed. *Akins*, 840 F.2d at 1376. The Seventh Circuit next addressed the issue in 1993. The court again acknowledged that the existence of a property right was an open question in the circuit. *Osteen v. Henley,* 13 F.3d at 226. Furthermore, after *Akins* and up until petitioners' actions in 1991, nothing occurred in the law of the other federal circuits and state appellate courts that would have indicated to a university official that *Akins* was no longer controlling in the Seventh Circuit. Thus, at the time the petitioners acted in 1991, the Seventh Circuit did *not* recognize a constitutionally protected property interest in continuing a college education, and had in fact granted qualified immunity to university defendants on that basis.

Powell's contention, and the finding of the lower courts, that a constitutionally protected property interest in continuing in a post-secondary education, was clearly established in 1991, is without merit. In 1991, the Seventh Circuit did *not* recognize such a right. *Akins,* 840 F.2d at 1376. There was not a "sufficient consensus", based on all relevant case law, to put a university administrator on notice of unlawful conduct. *Landstrom v. Illinois Dep't of Children,* 892 F.2d 670, 676 (7th Cir. 1990). No state or federal opinion decided after *Akins,* but before this case arose, would have caused a university administrator to question the *Akins* holding. The Wisconsin Supreme Court erred in denying petitioners qualified immunity on grounds that the law was clearly established. The two lower Wisconsin courts have held these petitioners to a standard of legal knowledge that even the Wisconsin State Supreme Court could not agree upon.

CONCLUSION

For the reasons discussed above and in the petition, this Court should issue a writ of *certiorari*.

Respectfully Submitted,

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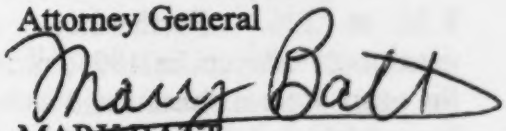

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